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SHORT FORM ORDER

INDEX No. 07-4993
CAL. No. 12-01949EQ

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 3-7-13
ADJ. DATE 11-12-13
Mot. Seq. # 010 - MotD
011 - MotD
012 - MotD

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U.S. BANK, N.A., AS TRUSTEE
C/O Homecomings Financial, LLC
9350 Waxie Way
San Diego, CA 92123

Plaintiff,

- against -

MICHAEL ISRAELI, HOMECOMINGS FINANCIAL, LLC, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR COLUMBIA HOME LOANS, LLC d/b/a BROKER FUNDING SERVICES, CO., ANNABELLE SCOTT HACKNEY, and MICHAEL SCOTT HACKNEY,

Defendants.

ANNABELLE SCOTT,

Third-Party Plaintiff,

CLIFFORD B. OLSHAKER, ESQ., KENNETH ARAGON, a/k/a KENNY ARAGON, FIDELITY BORROWING, LLC d/b/a FIDELITY BORROWING MORTGAGE BANKERS,

Third-Party Defendants.

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Upon the following papers numbered 1 to 30 read on these motions for summary judgment ; Notices of Motions/Order to Show Cause and supporting papers 1 - 15 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 16 - 21 ; Replying Affidavits and supporting papers 22 - 30 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion sequence numbers 010, 011 and 012 are combined herein for disposition; and it is further

ORDERED that motion sequence #010 for summary judgment by defendant Columbia Home Loans, LLC dismissing, with prejudice, the cross claims asserted against it by defendant/third-party plaintiff Annabelle Scott is decided as set forth herein; and it is further

ORDERED that motion sequence #011 by third-party defendant Clifford Olshaker, Esq. for summary judgment dismissing, with prejudice, the first, second, third, fourth, fifth, sixth, seventh and eighth causes of action against him is decided as set forth herein; and it is further

ORDERED that motion sequence #012 by the plaintiff for summary judgment on the relief demanded in its complaint, striking the affirmative defenses and dismissing the answer and counterclaims of defendant Annabelle Scott i/s/h/a Annabelle Scott Hackney is decided as set forth herein, and the branch of the motion directing the foreclosure sale of the subject premises to proceed pursuant to this court's judgment of foreclosure and sale dated January 4, 2008 and entered January 22, 2008 is denied.

In July 2006 defendant Michael Israeli ("Israeli") purchased the property known as 485 42nd Street in Copiague, New York (the "Property") for $255,000 from defendant Annabelle Scott i/s/h/a Annabelle Scott Hackney ("Scott"). Israeli financed the purchase with two loans from Columbia Home Loans, LLC d/b/a Brokers Funding Service, Co. ("Columbia") for $204,000 and $51,000, executing on July 20, 2006 two notes secured by a first and second mortgage on the Property. The mortgages name Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for Columbia and as the mortgagee for purposes of recording. The first mortgage was assigned to plaintiff.

In February 2007, plaintiff commenced this action to foreclose the first mortgage on the Property as only two payments were made. All of the named defendants defaulted in answering or otherwise appearing in the action. Upon motions by the plaintiff, by order of reference dated July 9, 2007, a referee was appointed to compute the amount due under the note secured by the first mortgage, and by order dated January 4, 2008 the judgment of foreclosure and sale was granted. Thereafter, on motion by Scott, as a tenant in possession, the default judgment entered against her was vacated, and she was granted leave to serve an answer with counterclaims and cross claims (*see* Order dated May 27, 2008 [Blydenburgh, J.] [the "Order"]). In the Order, the Judge expressed that based on Scott's assertions, a question of fact existed as to whether a fraudulent transfer of the Property had occurred, and if such was the case, "the validity of the mortgage upon which this mortgage foreclosure proceeding is based is cast into doubt."

Scott served her answer with affirmative defenses, counterclaims and cross claims dated June 19, 2008, and on July 29, 2009, commenced a third-party action against third-party defendants Clifford B. Olshaker, Esq. ("Olshaker"), Kenneth Aragon ("Aragon") and Fidelity Borrowing, LLC d/b/a Fidelity Borrowing Mortgage Bankers ("Fidelity"). The gravamen of Scott's third-party action is that the entire

transaction was a fraudulent mortgage foreclosure rescue scheme, pitched to her by Aragon, a mortgage broker employed by Fidelity, as a solution to prevent her from losing her Property which was facing foreclosure. According to Scott, Aragon brought Israeli into the transaction to act as the straw man to purchase and obtain financing from Columbia, which knew that the transaction was a fraud. In the mortgage documents, Israeli indicated he would occupy the Property, which Scott alleges, Columbia knew, or should have known was false. Scott also alleges that Aragon obtained Olshaker to represent her at the closing, who participated in, and knew of the fraud as he, together with Israeli's closing attorney, composed a Lease Agreement with Option to Purchase (the "Lease Agreement") and agreed to hold certain money in escrow to pay Israeli's mortgage.

In July 2006, the Property was appraised at $310,0000, and at the time of the closing Scott, who was 72 years old, owed approximately $68,000 plus interest and fees for a total of 115,000 on the mortgage facing foreclosure, $14,000 on a car loan, $300 on a credit card, and $2,000 to a judgment creditor. The monthly installment on the mortgage was $1,200, which included principal, interest, taxes and insurance. In addition to a seller's concession of $12,300, Scott paid all of the seller's and buyer's fees and expenses associated with the closing, including a finder's fee to Aragon; Israeli did not have any out-of-pocket expenses and made no investment in the Property. After the closing, pursuant to the Lease Agreement, Scott was obligated to pay $1,000 per month in rent to Israeli to remain in the house, plus all of the expenses connected therewith. (Under the terms of the Lease Agreement, Israeli agreed to sell the Property back to Scott on or before 13 months for fair market value.) Scott was also responsible for paying Israeli's mortgage installments for the 13-month lease period. To effectuate such payments $31,340 from the sale proceeds was put into an escrow account controlled by Olshaker who agreed to send the installments as each became due. The balance of the sale proceeds from the two loans of $68,762.42 was disbursed to Scott.

Scott has interposed an answer to the plaintiff's complaint with affirmative defenses, counterclaims and cross claims. In her third-party complaint against Olshaker, Aragon and Fidelity, Scott asserts causes of action for breach of General Business Law ("GBL") § 349, fraud, civil conspiracy to defraud, procedural and substantive unconscionability, reverse redlining discrimination in violation of the New York Human Rights Law, Executive Law § 296, violation of Real Estate Settlement Procedures Act 12 U.S.C. § 2601 et seq ("RESPA"), breach of fiduciary duty of the brokers, and legal malpractice as to Olshaker. Scott seeks to rescind the contract of sale and the first mortgage, a declaration that the note and mortgage are unenforceable, statutory, actual, compensatory and punitive damages, and costs, expenses and attorneys fees.

Columbia has interposed an answer with affirmative defenses to Scott's cross claims asserting lack of personal jurisdiction and that it acted in full compliance with federal and state laws. Olshaker has interposed an answer with affirmative defenses that Scott's claims are time-barred, lack of personal jurisdictional, and that any damages incurred were not the result of his conduct but the conduct or negligence of Scott or her agents. Olshaker also assert affirmative defenses of failure to state a cause of action, that he acted in full compliance with federal and state laws, Scott failed to plead fraud with adequate specificity, that the third-party summons is defective as it does not conform to CPLR 305, and Scott failed to serve him within the 120-day limit established by CPLR 306-b. Aragon has interposed an answer with affirmative defenses alleging that the third-party complaint fails to state a cause of action and that any

damages caused were not the result of his conduct but that of some other person. Aragon also asserts a cross claim against Olshaker and Fidelity for contribution. Fidelity has not answered.

The allegations and prayer for relief in Scott's third-party action prompted the plaintiff to move for leave, which was granted, to serve an amended complaint naming Olshaker, Aragon and Fidelity as defendants. In its amended complaint, plaintiff adds a second cause of action for damages against these additional defendants to protect its interest in the event a judgment is rendered in favor of Scott, or the court determines the mortgage is void. Olshaker and Aragon have interposed an answer to the plaintiff's amended complaint, and Scott has interposed an amended answer with counterclaims and cross claims. The plaintiff replied to Scott's counterclaims with thirty-three affirmative defenses.

Discovery has been completed and the note of issue filed. Columbia, Olshaker and the plaintiff now each separately move for summary judgment. Columbia moves for summary judgment dismissing Scott's cross claims as meritless. In so moving, Columbia argues that the loans were an arms-length real estate sale transaction, and that it was not aware, nor is there any evidence to demonstrate its awareness of the mortgage rescue scheme between Israeli, Scott and Aragon.

Olshaker moves for summary judgment dismissing the first, second, third, fourth, fifth, sixth, seventh and eighth causes of action in the third-party complaint on the grounds that Scott's claims fail to state a cause of action against him or are otherwise time-barred. Olshaker asserts that at the closing he went over all the documents with Scott, she understood that Israeli was purchasing the Property, and she approved payment of all the costs, signing the HUD forms and the checklists. Olshaker asserts that it strains credulity for Scott to now claim that she was unaware of the contents of the documents that bear her signature and unaware of the substance of the transaction.

The plaintiff moves for summary judgment in its favor dismissing Scott's affirmative defenses, cross claims and counterclaims on the ground that there are no issues of fact that Columbia was a bona fide encumbrancer for value, not a predatory lender, and provided the requisite banking and federal disclosures for the mortgage loans. The plaintiff maintains that as Columbia's assignee, it is entitled to be protected in its title, has standing to pursue this action, and points out that Scott ratified the underlying transaction, receiving $236,237.31 from the loan proceeds, directly or by way of payment of her debts and obligations. If Scott is granted a judgment voiding the deed to Israeli, the plaintiff maintains it is entitled to an equitable lien against the Property for the sums disbursed to, or on behalf of Scott from the $204,000 loan.

Real Property Law § 266 protects "the title of a purchaser or incumbrancer for a valuable consideration, unless it appears that [it] had previous notice of the fraudulent intent of [its] immediate grantor, or of the fraud rendering void the title of such grantor." However, "[a] mortgagee is under a duty to make an inquiry where it is aware of facts that would lead a reasonable prudent lender to make inquiries of the circumstances of the transaction at issue" (***Mortgage Elec. Registration Sys., Inc. v Rambaran***, 97 AD3d 802, 804, 949 NYS2d 694 [2d Dept 2012] [internal quotations omitted]). If a mortgagee fails to make such an inquiry, it is not a bona fide encumbrancer for value (***id.***; *see* ***Thomas v LaSalle Bank N.A.***, 79 AD3d 1015, 1017, 913 NYS2d 742 [2d Dept 2010]). Moreover, where an assignee is a bona fide purchaser for value, it "stands in the shoes of the assignor and takes the assignment subject to any preexisting liabilities" (***Mortgage Elec. Registration Sys., Inc. v Rambaran***, *supra* at 804; *see* ***Lapis Enterprises, Inc. v Intl. Blimpie Corp.***, 84 AD2d 286, 445 NYS2d 574 [2d Dept 1981]).

Here, while the mortgage documents did not reveal the nature of the transaction between Scott, Israeli and Aragon, Columbia concedes that one of its representatives was present at the closing. Further, based on Scott's assertions and Olshaker's deposition testimony, the details of the Lease Agreement were discussed openly at the closing. Indeed, Scott and Olshaker both testified, and Columbia does not dispute that the handwritten Lease Agreement was composed and executed during the closing at the table around which all the attendees were sitting. Thus, Columbia may be chargeable with notice of the alleged fraud (*see* ***Lucia v Goldman***, 68 AD3d 1064, 893 NYS2d 90 [2d Dept 2009]; ***LaSalle Bank N.A. v Ally***, 39 AD3d 597, 600, 835 NYS2d 264 [2d Dept 2007]). Therefore, summary judgment is not warranted in favor of Columbia against Scott as questions are raised as to whether the facts and circumstances surrounding the transaction when cumulatively examined, should have generated Columbia's suspicion relative to the sale of the Property and the bona fides of the entire transaction (*see* ***Mortgage Elec. Registration Sys., Inc. v Rambaran***, *supra*; ***Lucia v Goldman***, *supra*; ***LaSalle Bank N.A. v Ally***, *supra*; *see also* ***Miller-Francis v Smith-Jackson***, 113 AD3d 28, 976 NYS2d 34 [1st Dept 2013]). As Columbia has failed to establish that it lacked knowledge of the fraud at the time the mortgages were entered into with Israeli, the plaintiff, as its assignee, likewise, is not entitled to summary judgment in its favor against Scott (*see* ***Mortgage Elec. Registration Sys., Inc. v Rambaran***, *supra*; ***JP Morgan Chase Bank v Munoz***, 85 AD3d 1124, 927 NYS2d 364 [2d Dept 2011]; ***Lapis Enterprises, Inc. v Intl. Blimpie Corp.***, *supra* at 291 [a mortgage "is always subject to the defense existing between the original parties"]).

Plaintiff argues that it is entitled to be equitably subrogated to the rights of the prior mortgagees. However, as assignee of the mortgage, plaintiff acquired no rights greater than those of the assignor, Columbia, and took the assignment of the mortgage subject to all defenses and counterclaims had against Columbia (***Crispino v Greenpoint Mtge. Corp.***, 304 AD2d 608, 758 NYS2d 367 [2d Dept 2003]). Since triable issues of fact exist as to whether Columbia was aware of the underlying fraud, the doctrine of unclean hands would bar its entitlement to equitable subrogation (***id.***; *see also* ***William v Mentore***, 115 AD3d 664, 981 NYS2d 763 [2d Dept 2014]). Hence, there is an issue of fact as to whether the plaintiff, which is subject to the same defense, is entitled to such equitable relief (***Crispino v Greenpoint Mtge. Corp.***, *supra*; *cf.* ***Harris v Thompson***, 117 AD3d 791, 985 NYS2d 713 [2d Dept 2014]). Therefore, the plaintiff has failed to establish its prima facie entitlement to judgment as a matter of law on this claim.

The court will now address the branch of Olshaker's motion which seeks summary dismissal of Scott's legal malpractice claim. "An attorney has the responsibility to investigate and prepare every phase of his or her client's case" (*see* ***Brady v Bisogno & Meyerson***, 32 AD3d 410, 410, 819 NYS2d 558 [2d Dept 2006]; ***Parksville Mobile Modular v Fabricant***, 73 AD2d 595, 598, 422 NYS2d 710 [2d Dept 1979]). Moreover, "[t]he attorney-client relationship is by definition a 'confidential' one. The relationship is presumptively 'unequal' and the attorney who counsels a client to behave illegally or fraudulently is more blameworthy than the client who follows such advice" (***Dillon v Dean***, 158 AD2d 579, 580, 551 NYS2d 547 [2d Dept 1990]).

In an action to recover for legal malpractice, the plaintiff must demonstrate that "the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession' and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages" (***Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer***, 8 NY3d 438, 442, 835 NYS2d 534 [2007], quoting ***McCoy v Feinman***, 99 NY2d 295, 301-302, 755 NYS2d 693 [2002]; ***Parklex Associates v Flemming Zulack Williamson Zauderer, LLP***, 118 AD3d 968, 970, 989 NYS2d 60 [2d Dept

2014]). The issues involved in a legal malpractice claim are "not part of an ordinary person's daily experience, and to prevail at trial, plaintiff will be required to establish by expert testimony that defendant failed to perform in a professionally competent manner" (***Suppiah v Kalish***, 76 AD3d 829, 832, 907 NYS2d 199 [1st Dept 2010]). However, in the context of a motion for summary judgment, the burden rests on the moving party, to demonstrate affirmatively the merit of his defense, through expert opinion that he did not perform below the ordinary reasonable skill and care possessed by an average member of the legal community (***id.***; *see* ***Alizio v Feldman***, 82 AD3d 804, 918 NYS2d 218 [2d Dept 2011]). A defendant moving for summary judgment is also required "to establish through an expert's affidavit that even if he did commit malpractice, his actions were not the proximate cause of plaintiff's loss" (***Suppiah v Kalish***, *supra* at 832).

Here, in support of his motion, Olshaker offers his affirmation with various exhibits annexed and a memorandum of law. He does not, however, attempt to establish through expert opinion that he did not perform below the ordinary reasonable skill and care possessed by an average member of the legal community. He also fails to establish, as required on his motion for summary judgment, that even if he did commit malpractice, his actions were not the proximate cause of Scott's loss. As Olshaker has failed to submit such an expert affidavit, he has failed to satisfy his prima facie burden of establishing entitlement to summary dismissal of Scott's legal malpractice cause of action (*see* ***Suppiah v Kalish***, *supra*; *see also* ***Alizio v Feldman***, *supra*; *cf.* ***Brady v Bisogno & Meyerson***, *supra*).

Olshaker maintains, however, that Scott's legal malpractice claim is time-barred, as the third-party action was interposed on July 24, 2009, and that he did not provide any legal advice to Scott after the date of the closing. July 20, 2006. Olshaker asserts that after the closing, his role was that of an escrow agent, not attorney.

A cause of action sounding in legal malpractice must be commenced within three years following the accrual of the claim (CPLR § 214[6]), which is measured from the date that the injury is claimed to have occurred (***McCoy v Feinman***, *supra*; ***Ackerman v Price Waterhouse***, 84 NY2d 535, 620 NYS2d 318 [1994]). The statute of limitations can be tolled by operation of the doctrine of continuous representation, which will halt the running of the statute until such time that the ongoing representation is concluded (***Shumsky v Eisenstein***, 96 NY2d 164, 726 NYS2d 365 [2001]; ***Piliero v Adler & Stavros***, 282 AD2d 511, 723 NYS2d 91 [2d Dept 2001]). The doctrine applies where there is a clear indication of an ongoing, continuous, developing and dependent relationship between the client and the attorney (*see* ***Piliero v Adler & Stavros***, *supra*; ***Luk Lamellen U. Kupplungbau GmbH v Lerner,*** 166 AD2d 505, 560 NYS2d 787 [2d Dept 1990]). One of the predicates is the client's continuing trust and confidence in the relationship (***Piliero v Adler & Stavros***, *supra*; ***Luk Lamellen U. Kupplungbau GmbH v Lerner***, *supra*).

Here, Olshaker has failed to demonstrate that the attorney-client relationship ceased to exist on July 20, 2006 immediately after the closing. It is clear that Scott believed Olshaker continued to represent her. Olshaker agreed to make at least 13 mortgage payments from funds he was holding in escrow on her behalf, services related to his representation of Scott at the closing. Moreover, Scott testified that when she became aware of the instant action, she called her attorney, Olshaker, who she states indicated that there was a mistake that he would remedy. Hence, the statute of limitations was tolled until at least July 20, 2007 (during the time which the mortgage payments were to be made). As this action was commenced

approximately two years later, in July 2009, it is timely. Thus, Scott's legal malpractice claim remains viable.

The remainder of the three motions are decided as follows. Scott's first affirmative defense of lack of standing is dismissed. Plaintiff has established, prima facie, that it had standing to prosecute its pleaded claims for foreclosure and sale by demonstrating that prior to the commencement of this action, it took possession of, and was the holder of the note indorsed in blank by Columbia, a copy of which was attached to its moving papers (*see* ***Bank of N.Y. v Silverberg***, 86 AD3d 280, 926 NYS2d 532 [2d Dept 2011]; ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]; ***Deutsche Bank Natl. Trust Co. v Pietranico***, 33 Misc 3d 528, 928 NYS2d 818 [Sup Ct Suffolk County 2011], *aff'd* 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]; *see also* UCC § 3–202; § 3–204; § 9–203[g]). "The mere possession of a promissory note endorsed in blank (just like a check) provides presumptive ownership of that note by the current holder" (***Deutsche Bank Natl. Trust Co. v Pietranico***, *supra* at 545). The holder of the note is deemed the owner thereof with standing to foreclose (*id.*; citing *see e.g.* ***Mortgage Elec. Registration Sys., Inc. v Coakley***, *supra*). Since the mortgage follows as an incident of the note, when the note changed hands, the mortgage interest automatically followed (*see* ***Deutsche Bank Nat. Trust Co. v Spanos***, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013]; ***U.S. Bank N.A. v Cange***, 96 AD3d 825, 947 NYS2d 522 [2d Dept 2012]; ***U.S. Bank, NA v Sharif***, 89 AD3d 723, 933 NYS2d 293 [2d Dept 2011]; ***Bank of New York v Silverberg***, *supra*). Thus, based on the evidence before the court, the plaintiff was in possession of the note on the date the instant action was commenced, and therefore is deemed the presumptive owner of the note and mortgage with standing to prosecute its claim for foreclosure and sale (*see* ***U.S. Bank, N.A. v Cange***, *supra*; ***U.S. Bank, NA v Sharif***, *supra*).

Scott's arguments in opposition that the documents submitted (1) do not specify to whom the note was sold or when, and (2) fail to indicate that the subject note was assigned or sold to plaintiff, are unavailing given the presumption of ownership. Moreover, to buttress the presumption, the plaintiff has submitted an affidavit of Peter Knapp, a senior litigation analyst employed by Ocwen Loan Servicing, LLC, the servicer of the subject loan as of February 16, 2013. Knapp attests that he reviewed the loan records and located the original $204,000 note along with the original allonge. He asserts that the plaintiff received these original loan documents on September 18, 2006 which was prior to the commencement of the instant action. Therefore, the first affirmative defense is stricken.

In Scott's second affirmative defense she alleges that the plaintiff failed to comply with Administrative Order 548/10 ("AO/548/10") as the attorney affirmation required thereby was not filed with its amended complaint. The Administrative Order initially issued by the Chief Administrative Judge of the State of New York on October 20, 2010, and amended March 2, 2011, effective November 18, 2010, *nunc pro tunc*, provides that in cases where a judgment of foreclosure has been entered but the property has not yet been sold, the plaintiff's counsel is required to file an affirmation with the court five business days before the scheduled auction with a copy served on the referee (AO/548/10).

The instant mortgage foreclosure action was pending at the time of the effective date of the Administrative Order. In January 2008 the plaintiff had been granted a judgment of foreclosure of sale, and the auction has not yet taken place. Based on the plain language of the Administrative Order, plaintiff's counsel is therefore required to file the attorney affirmation five days before the auction. Contrary to

Scott's assertion, there is no requirement that such affirmation accompany an amended complaint. Therefore, the second affirmative defense is without merit, and is dismissed.

Scott's fifth affirmative defense/second counterclaim and cross claim cannot be sustained as she fails to allege a viable claim against the plaintiff, Columbia or Olshaker (hereinafter the "movants" when referred to collectively) for violations of GBL § 349. This section declares as unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state" (*see* GBL § 349 [a]). Section 349 is directed at wrongs against the consuming public (*see* ***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d 20, 623 NYS2d 529 [1995]). "To assert a viable claim under General Business Law § 349(a), a plaintiff must plead that (1) the challenged conduct was consumer-oriented, (2) the conduct or statement was materially misleading, and (3) damages" (***Lum v New Century Mortgage Corp.***, 19 AD3d 558, 559, 800 NYS2d 408 [2d Dept 2005], *lv denied* 6 NY3d 706, 812 NYS2d 35 [2005]). For conduct to be consumer-oriented it must be demonstrated that it had "a broader impact on consumers at large" (*see* ***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.***, *supra* at 26). Thus, "[p]rivate contract disputes unique to the parties do not fall within the ambit of the statute" (*id.*), Here, it cannot be said that the alleged fraudulent mortgage rescue scheme, a private transaction unique to Israeli and Scott, had an impact on consumers at large. Therefore, the fifth affirmative defense and second counterclaim are hereby severed and summarily dismissed.

In her eighth affirmative defense and fifth counterclaim, Scott seeks to rescind the transaction based on unconscionability. As to Olshaker, Scott alleges that he "purported to have the requisite skill and knowledge to represent [her] interest as the 'Seller's Attorney'" and that Olshaker was selected by Aragon in a "clear attempt to steer [her] away from independent advice and to keep her ignorant about the process and the consequences of the transaction." Scott further alleges that Aragon and Olshaker "are sophisticated individuals...with significant mortgage, real estate and financial experience, while she is over 70 years old with "little or no familiarity with refinance and/or mortgage procedure." Scott maintains that "[t]he disparity in knowledge coupled with the conflicted representation created a clear lack of bargaining power that allowed [her] to be deceived and induced to enter into a fraudulent transaction concerning her home" and that "[t]he entire transaction imposed upon [her] was grossly unfair and included one-sided terms which were abusive and oppressive." Scott alleges that Olshaker knew that she would not gain a substantial benefit from the transaction and that he knew the transaction would cause her to lose her home permanently. Scott posits that "[s]aid procedural and substantive unconscionability renders the sale of [her] home voidable and unenforceable and entitles [her] to damages."

An unconscionable contract is one that is so grossly unreasonable or unconscionable in light of the mores of business practices of the time and place as to be unenforceable according to its literal terms (***Gillman v Chase Manhattan Bank***, 73 NY1, 537 NYS2d 787 [1988]). As a general proposition, unconscionability requires a showing of an absence of meaningful choice on the part of one of the parties (the procedural element of unconscionability) together with contract terms which are unreasonably favorable to the other party (substantive element) (*see* ***Matter of State of New York v Avco Fin. Serv. of N.Y.***, 50 NY2d 383, 429 NYS2d 181; ***Simar Holding Corp. v GSC***, 87 AD3d 688, 928 NYS2d 592 [2d Dept 2011]); (*see generally* ***Matter of Friedman***, 64 AD2d 70, 84, 407 NYS2d 999). Whether a contract provision is unconscionable presents an issue of law for the court to decide (***Simar Holding Corp. v GSC***, *supra* at 690).

This cause of action must be dismissed as to Olshaker. The allegations against Olshaker are essentially for legal malpractice, do not allege distinct damages, and thus are duplicative (*see generally* ***Sierra Holdings, LLC v Phillips, Weiner, Quinn, Artura & Cox***, 112 AD3d 909, 977 NYS2d 751 [2d Dept 2013]). It is also dismissed as to Columbia and the plaintiff as Scott has failed to present evidence of immoral or unconscionable conduct on the part of either of these parties (*see e.g.* ***PHH Mtge. Corp. v. Davis***, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013], *lv dismissed* 23 NY3d 940, 987 NYS2d 593 [2014]).

The ninth affirmative defense/sixth counterclaim and cross claim alleging violations of the Real Estate Settlement Procedures Action, 12 USC § 2601, et seq, ("RESPA) is also dismissed. Assuming, arguendo, that RESPA applies to Scott, a violation of this statute does not adversely affect the validity or enforceability of a federally related mortgage loan (*see* 12 USC § 2615) and thus, a disclosure violation of RESPA does not constitute a valid defense to mortgage foreclosure (*see* ***Fremont Inv. & Loan v Haley***, 23 Misc 3d 1138[A], 889 NYS2d 505 [Sup Ct, Queens County 2009]; ***Fremont Inv. & Loan v Laroc***, 21 Misc 3d 1124[A], 873 NYS2d 511 [Sup Ct, Queens County 2008]). Furthermore, RESPA does not create a private right of action for rescission for failure to disclose settlement costs (*see* ***Fremont Inv. & Loan v Haley***, *supra* [and the cases cited herein]).

Also dismissed are the tenth affirmative defense/seventh counterclaim and cross claim alleging a violation of the Home Equity Loan Protection Act, 15 USC 1639 et seq, based on costs and fees Scott paid from the buy-sell agreement. "TILA was enacted to protect consumers by requiring lenders to make meaningful disclosures about loans and their costs so the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing' 15 U.S.C. § 1601(a); *see generally id.* §§ 1601–1667f" (***Cunningham v Nationscredit Fin. Servs. Corp.***, 497 F3d 714, 717 [7th Cir 2007]; *see* ***Shroder v Suburban Coastal Corp.***, 729 F2d 1371 [11th Cir 1984]). "It was subsequently amended by HOEPA, which requires lenders to make additional disclosures to borrowers of high-cost' or high-rate' loans" (***Cunningham v Nationscredit Fin. Servs. Corp.***, *supra* at 717; *see* 15 USC § 1639). As Scott is not a borrower, this claim must be dismissed.

Plaintiff argues that Scott's claim for the imposition of a constructive trust should be dismissed as no facts have been alleged that would give rise to a fiduciary relationship between Scott and any of the defendants. The elements of a constructive trust are a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, and unjust enrichment (***Sharp v Kosmalski***, 40 NY2d 119, 386 NYS2d 72 [1976]; ***Williams v Eason***, 49 AD3d 866, 854 NYS2d 477 [2d Dept 2008]). It has been held that while these elements are useful in many cases, the "constructive trust doctrine is not rigidly limited" (***Simmonds v Simmonds***, 45 NY2d 233, 241, 408 NYS2d 359 [1978]; *see* ***O'Brien v Dalessandro***, 43 AD3d 1123, 1124, 843 NYS2d 348 [2d Dept 2007 [factors should be applied flexibly]). The ultimate purpose of a constructive trust is to prevent unjust enrichment, and thus, may be imposed in the absence of a confidential or fiduciary relationship (***Sharp v Kosmalski***, *supra*, *citing see e.g.* ***Latham v Father Divine***, 299 NY 22, 85 NE2d 168 [1949]), and "when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest" (***O'Brien v Dalessandro***, 43 AD3d 1123, 1124, 843 NYS2d 348 [2d Dept 2007]; ***Cruz v McAneney***, 31 AD3d 54, 58-59, 816 NYS2d 486 [2d Dept 2006]), and "whenever necessary to satisfy the demands of justice" (***Simmonds v Simmonds***, *supra* at 241). Viewing the allegations in a light most favorable to Scott, justice in the instant case could

conceivably require the imposition of a constructive trust. Therefore, summary dismissal of this claim is not warranted.

To the extent that Scott attempts to persuade this court that she was the victim of a form of predatory or discriminatory lending practices known as reverse redlining, her arguments are unavailing. Reverse redlining is "a scheme that targets low-income minorities, offering them exorbitantly high interest rate loans in large amounts, even though they do not have the ability to repay, thereby approving a loan designed to fail, and resulting in loss of the home through foreclosure" (***Equicredit Corp. v Turcios***, 300 AD2d 344, 752 NYS2d 684 [2d Dept 2002]). It has been held that "a mortgage granted to a minority buyer for the purchase of property in a minority area which carries an interest rate that exceeds nine percent creates a rebuttable presumption of discriminatory practice" (***M&T Mortgage Corp. v Foy*** (20 Misc 3d 274, 275, 858 NYS2d 567 [Sup Ct, Kings County 2008]). Scott was not a buyer, therefore, the rebuttable presumption has not been created, thus, this claim in her third-party complaint is not viable.

Any remaining arguments not explicitly addressed herein have been reviewed and deemed to be without merit.

Accordingly, the motions 010, 011 and 012 are granted in favor of Columbia, Olshaker and plaintiff to the extent of severing and summarily dismissing: Scott's first affirmative defense that the plaintiff lacks standing; the second affirmative defense that the plaintiff failed to comply with AO/548/10; the fifth affirmative defense, second counterclaim and cross claim and the first cause of action in her third-party complaint that the movants violated GBL § 349; the eighth affirmative defense, fifth counterclaim and cross claim and fourth cause of action in the third-party complaint of unconscionability to the extent asserted against the movants herein; the ninth and tenth affirmative defenses, sixth and seventh counterclaims and cross claim and the sixth cause of action in the third-party complaint alleging violations of RESPA and HOEPA; and the fifth cause of action in the third-party complaint alleging reverse redlining discrimination. The motions are otherwise denied and the remainder of the action continued.

Dated: 10/21/19

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**