[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

----------x

WELLS FARGO BANK, N.A.,

Plaintiff,

-against-

GEORGE SANCHEZ

Defendant.

Index No.: 104131/2011
Motion Seq. 001

DECISION/ORDER

----------x

The following papers numbered 1 to 6 were considered on this motion by plaintiff for summary judgment:

Papers	Numbered
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1, 2, 3
Answering Affidavits - Exhibits (Memo)	4, 5
Replying Affidavits (Reply Memo)	6

RECEIVED
JAN 14 2015
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Cross-Motion: [ ] Yes [X] No

DORIS LING-COHAN, J. :

FILED
JAN 15 2015
NEW YORK
COUNTY CLERK'S OFFICE

Upon the above cited cases, plaintiff's motion for summary judgment is granted in accordance with the below decision.

It is undisputed that on or about December 13, 2005, defendant executed and delivered to plaintiff an EquityLine with FlexAbility Agreement in the amount of $49,300 ("Home Equity Agreement"). The Home Equity Agreement was secured by a second mortgage on defendant's property located at 5872 Winebrook Drive, Westerville, Ohio (the "subject property"). Thereafter, defendant defaulted on the Home Equity Agreement and, on or about May 10, 2008, defendant entered into a Short Sale Letter Agreement (the "Short Sale Agreement") with plaintiff, in which plaintiff agreed to release the second mortgage which secured the Home

Equity Agreement for the sum of $4,600 and defendant agreed to repay the shortfall balance of $44,698.37, by making monthly payments over a period of 120 months at 0% interest. Defendant failed to make the required payments under the Short Sale Agreement, and, thereafter, plaintiff commenced the within action to recover monies owed, in the amount of $43,948.37, asserting causes of action for breach of contract and an account stated.

It is well established that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact...". *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once such a showing is made, the burden shifts to the opponent, to produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. *See Zuckerman v. City of New York*, 49 NY2d 557 (1980). However, the Court of Appeals has made clear that bare allegations or conclusory assertions are insufficient to create genuine, bona fide issues of fact necessary to defeat such a motion. *See Rotuba Extruders, Inc. v. Ceppos*, 46 NY2d 223, 231 (1978). Further, "the construction of an ambiguous 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. Warburg & Co.*, 284 AD2d 203 (1st Dept 2001)(citations omitted).

Applying such principles herein, plaintiff has established a *prima facie* entitlement to judgment as a matter of law on its claim for breach of the Short Sale Agreement, which has not been

sufficiently refuted by defendant. Significantly, defendant does not dispute that he entered into the Home Equity Agreement/second mortgage with plaintiff, that he agreed to the short sale of the subject property which secured such mortgage by signing the Short Sale Agreement and that he defaulted in paying under the terms of the Short Sale Agreement. In opposition, defendant presents no evidence to contradict the documentary evidence presented by plaintiff on the within motion and merely asserts conclusory allegations, which are insufficient to defeat a motion for summary judgment. Specifically, defendant's claim that the short sale of the property absolved him of any obligations to repay the money owed to plaintiff is in direct conflict with the clear and unambiguous terms of the Short Sale Agreement, which specifically provided that defendant was to pay the shortfall amount of $44,698.37. Additionally, that defendant made three payments to plaintiff following execution of the Shortfall Agreement, belies such assertion. Moreover, to the extent that defendant is arguing that plaintiff orally agreed to forgive the shortfall amount, defendant is barred by the parol evidence. *See W.W.W. Associates, Inc. v. Frank Giancontieri*, 77 NY2d 157, 162 (1990)(where a contract is clear, "evidence outside the four corners of the document as to what was really intended, but unstated or misstated is generally inadmissible to add to or vary the writing).

Additionally, defendant's *unsubstantiated* and concluory affirmative defenses of "TILA and RESPA",[1] that Ohio law allowing deficiency judgments should not apply to defendant because he was not an Ohio resident, and accord and satisfaction, are also insufficient to defeat plaintiff's

[1] Defendant merely refers to "TILA and RESPA", without any reference to the actual statutes, or the applicable sections, presumably, the Truth in Lending Act, 15 USC §1601 *et seq.* and the Real Estate Settlement Procedure Act of 1974, 12 USC §2601 *et seq.*

motion for summary judgment. It is noted that plaintiff has failed to provide any additional facts or proof to support his affirmative defenses in opposition to the within motion. Moreover, as to TILA and RESPA, defendant fails to indicate which provisions were allegedly violated and the alleged applicability to this case. Furthermore, plaintiff is not seeking a "deficiency judgment", as argued by defendant, but rather, defendant entered into a short sale agreement to avoid foreclosure and agreed by the express terms of the Short Fall Agreement that he was still indebted to plaintiff, in the amount of $44,698.37. As to defendant's defense of accord and satisfaction, significantly absent is evidence that there was a satisfaction by defendant of the Short Sale Agreement, in which he agreed that he remained indebted to plaintiff in the amount of $44.698.37, the shortfall amount. *See Narendra v. Thieriot*, 41 AD3d 442, 443 (2d Dept 2007)(an accord and satisfaction is effected when "the parties have made a new contract discharging all or part of their obligations under the original contract"); *Ellenbogen & Goldstein, P.C.*, 226 AD2d 237 (1st Dept 1996)(where there is no satisfaction plaintiff remains free to sue for the moneys owed).

Defendant's argument that plaintiff violated New York Real Property Actions and Proceedings Law ("RPAPL") §§ 1301(3) and 1371 is also without merit, since neither section is applicable to property located outside of the State of New York, as is the case herein. *See Wells Fargo Bank Minnesota, N.A. v. Cohn*, 4 AD3d 189 (1st Dept 2004).

Further, no evidence has been supplied by defendant to support his argument that plaintiff violated New York's General Business Law ("GBL") § 349 (a), which provides that "[d]eceptive

acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." The court notes that, defendant has not asserted a counterclaim based upon plaintiff's alleged deceptive practices, rather, merely indicates in opposition to plaintiff's motion that, "[w]hile at this point defendant consumer does not move for leave of court to counterclaim against plaintiff bank, defendant nevertheless cites Gen. Bus. L. § 349 to oppose the instant motion for summary judgment...". ¶3, Affirmation in Opposition. Such statute which provides a private right of action to "any person who has been injured by reason of" such illegal conduct (GBL § 349 [h]), requires that "a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice" (*City of New York v. Smokes-Spirits Com, Inc.*, 12 NY3d 616, 621 [2009]). With respect to the first element, a party:

> claiming the benefit of the section must, at a threshold, charge conduct that is consumer oriented. The conduct need not be repetitive or recurring but defendant's acts or practices must have a broad impact on consumers at large; [p]rivate contract disputes unique to the parties..would not fall within the ambit of the statute.

New York Univ. v. Continental Ins. Co., 87 NY2d 308, 320 (1995) (internal quotations and citations omitted). As the Court of Appeals noted in *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, (85 NY2d 20, 27 [1995]), acts which are the subject of the statute must be "consumer-oriented in the sense that they potentially affect similarly situated consumers." The test is "whether a reasonable consumer in plaintiffs' circumstances might have been misled by the . . . conduct." *Id.* Here, however, defendant merely asserts general legal

conclusions and speculation, rather than concrete facts from which this court could infer a marketing scheme with broad impact or injury to consumers at large. Thus, defendant has failed to sufficiently demonstrate that defendant's alleged deceptive acts or practices are consumer-oriented within the meaning of the statute, as opposed to a private contract dispute unique to the parties. *See New York Univ.*, 87 NY2d at 320. Nevertheless, as noted above, defendant has not asserted a counterclaim based upon GBL §349.

Accordingly, based upon the above, it is

ORDERED that plaintiff's motion for summary judgment is granted; and it is further

ORDERED that upon proof of service of a copy of this order with notice of entry, the judgment clerk shall enter judgment in plaintiff's favor against defendant George L. Sanchez, in the amount of $43,948.37 (the court notes that plaintiff has waived all pre and post judgment interest [¶15, Affidavit in Support of Motion]); and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all defendant, with notice of entry.

Dated: 1/14/15

FILED
JAN 15 2015
NEW YORK
COUNTY CLERK'S OFFICE

Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\wells fargo v. sanchez.wpd

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITIO
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHEI
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENC