

Stavrou v Wells Fargo Bank, N.A.

2016 NY Slip Op 30336(U)

February 19, 2016

City Court of Peekskill, Westchester County

Docket Number: SC-27-16

Judge: Reginald J. Johnson

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PEEKSKILL CITY COURT
COUNTY OF WESTCHESTER: STATE OF NEW YORK

-----X

JOSEPH STAVROU,

DECISION & ORDER

Plaintiff,

--against--

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WELLS FARGO BANK, N.A.,

Defendant.

-----X

REGINALD J. JOHNSON, J.

In this small claims action, the Plaintiff, Joseph Stavrou, seeks monetary damages from Wells Fargo Bank, N.A. (Defendant) for breach of contract arising out of a loan modification agreement on his residential real property. Defendant defaulted in pleading and appearance and this matter proceeded to an inquest on damages.

For the reasons that follow, the complaint is dismissed.

In deciding this matter, the Court considered the testimony of the Plaintiff and the following exhibits marked in evidence:

Plaintiff's Exh. 1 (1 page) Cover page listing exhibits;

Plaintiff's Exh. 2 (8 pages) Wells Fargo Loan Modification Documents

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Plaintiff's Exh. 3 Wells Fargo Confirmation of Bi-weekly Automatic Electronic Withdrawal;

Plaintiff's Exh. 4 Copies of correspondence

Plaintiff's Exh. 5 Copy of H.A.M.P. Agreement

Plaintiff's Exh. 6 H.A.M.P Snapshot

Plaintiff's Exh. 7 Copies of Wells Fargo Statements

Trial

At trial, the Plaintiff testified that he applied for a Home Affordable Modification Agreement (H.A.M.P.) to modify a home equity line of credit on his residential real property in Cortlandt Manor, New York (Exh. 2). According to the terms of the H.A.M.P. loan, the Plaintiff's mortgage payments and interest rates would escalate during a set number of years as follows: year 1-5, interest rate at 2%, mortgage payment \$973.66; year 6, interest rate at 3%, mortgage payment \$1,027.64; years 7-26, interest rate at 3.375%, mortgage payment \$1,047.79. In addition, \$1,207.04 of the pre-modification principal would be forgiven (Exh. 5). All of the aforesaid was conditioned upon the Plaintiff successfully making all of his trial plan payments.

The Plaintiff successfully completed the H.A.M.P loan trial plan and his mortgage was permanently modified on or about February 1, 2013 (Exh. 2). Plaintiff argues that Defendant did not forgive his pre-modification principal in the sum of \$1,207.04 but rather re-allocated that

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sum to interest and an escrow balance (Exh. 7, Customer Account Activity Statement, Activity Codes 143 and 147).

In a letter dated February 1, 2013, Defendant notified the Plaintiff that

Now that your loan has been modified, an escrow account is still required. As you know, Wells Fargo Home Mortgage directs a portion of each mortgage payment you make into your escrow account so we may pay your annual real estate taxes and insurance premiums on your behalf. This ensures your tax and insurance bills are paid in full and on time, without requiring you to save large amounts of money and keep track of due dates.

(Exh. 2.).

The Plaintiff argued that the re-allocation of his pre-modification principal to his escrow account was a breach of contract since the H.A.M.P loan gave him the option to pay any escrow shortage in one lumps sum or in 60 monthly payments (Exh. 2). Plaintiff stated that he selected the installment option. However, in a letter to Plaintiff dated August 11, 2014, Defendant informed Plaintiff that “[o]n January 20, 2013, the forgiveness [pre-modification principal] was applied to your loan in the amount of \$1,207.04 as it was stated in your loan modification documents.” (Exh. 4). Plaintiff received this letter because he submitted

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it as an exhibit (Id.). Apparently, Plaintiff did not accept Defendant's representation that the principal forgiveness was applied to his loan, so he sought a further clarification from the Defendant.

In a letter dated April 23, 2015, Defendant stated that

Per the loan modification agreement effective January 1, 2013, the loan modification was issued with a \$1,207.04 amount of principal forgiveness. Emily Vaughn's letter (please see enclosed) from August 11, 2014, illustrates that \$266.26 of the principal forgiveness went to pay off excess interest due, while \$940.78 of the principal forgiveness went to the account's escrow.

(Id).

The dispositive question for the Court is whether the Defendant had a contractual right to re-allocate or apply the Plaintiff's pre-modification principal (principal forgiveness) to interest and escrow under the terms of the H.A.M.P. loan. Based on a review of the exhibits admitted into evidence in this case, it does not appear that Defendant had the right to re-allocate the principal forgiveness to interest and escrow. According to a summary of the Plaintiff's modified mortgage, Defendant informed the Plaintiff that he had an escrow shortage of \$1,309.41 but that the Plaintiff had the option of paying that amount off in one lump sum or in monthly installments (Exh. 2). Plaintiff testified that he opted to pay the escrow

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shortage in monthly installments.

A review of the terms of the H.A.M.P. loan does not indicate that the Defendant had a contractual right to re-allocate the principal forgiveness to interest and escrow, and in none of Defendant's correspondence to the Plaintiff does it cite a paragraph or provision of the H.A.M.P. loan as basis for taking such action. Because the Defendant defaulted in pleading and appearance, the Court was unable to inquire of the Defendant whether it had contractual authority to re-allocate the principal forgiveness to interest and escrow.

Although the terms of the H.A.M.P. loan modified parts of the original Loan Documents and reaffirmed the rest (Exh. 5 ¶¶ E and F), the Plaintiff did not produce or enter into evidence the Loan Documents so that the Court can determine whether those documents authorized the Defendant to re-allocate the principal forgiveness.

In a letter dated August 11, 2014, the Defendant stated that it forgave the pre-modification principal in the sum of \$1,207.04, re-allocated portions of that sum to interest and escrow, and reported the forgiveness to the Internal Revenue Service (IRS) (Exh. 4). The Plaintiff acknowledged that he received an IRS 1099 Form from the Defendant regarding the principal forgiveness. When the Court asked the Plaintiff what action, if any, he took when he received the IRS 1099 Form three years ago, he responded that he took no action. When the Court

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asked the Plaintiff why he did not take any action after having received the IRS 1099 Form, if he believed that the Defendant did not forgive the subject pre-modification principal, the Plaintiff responded that he did not know why he did not take any action.

Discussion

It has been held that the Small Claims Part of a City Court is commanded to “do substantial justice between the parties according to the rules of substantive law.” Williams v Roper, 269 A.D.2d 125, 126, 703 N.Y.S.2d 77, 79 (1st Dept 2000); UCCA §1804; see also, Milsner v. McGahon, 20 Misc.3d 127(A), 2008 WL 2522307 (App. Term. 9th & 10th Judicial Districts); Basler v. M&S Masonry & Construction, Inc., 21 Misc.3d 137(A), 2008 WL 4916105 (App. Term, 9th & 10th Judicial Districts). This is especially so since the practice, procedures and forms utilized in the Small Claims Part were meant to “constitute a simple, informal and inexpensive procedure for the prompt determination of such claims in accordance with the rules and principles of substantive law.” UCCA §1802. Further, the Court “shall not be bound by statutory provisions or rules of practice, procedure, pleading or evidence....” UCCA §1804.

At a bench trial, the Court is empowered to make credibility determinations regarding the testimony of the parties and the evidence

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proffered by them. L'Esprance v. L'Esprance, 243 AD2d 446, 663 NYS2d 95 (2d Dept. 1997). The reason for this is that the trial court sitting as the trier of fact had the opportunity to hear and observe the demeanor of the witnesses while they were testifying as well as to weigh the evidence proffered by them. Keller v. Halsey, 202 NY 588, 95 N.E. 634 (1911); Ahr v. Karolewski, 48 AD3d 719, 853 NYS2d 172 (2d Dept. 2008); Mazzariello v Davin, 252 AD2d 884, 676 NYS2d 354 (3d Dept. 1998); QPPII-35-12 99th Street, LLC v. Batista, 33 Misc.3d 25, 932 N.Y.S.2d 301 (Sup. Ct. App. Term 2d Dept., 2011).

In order for the Plaintiff to prevail on cause of action for breach of contract, the Plaintiff must prove 1) the existence of a contract, 2) the Plaintiff's performance under the contract, 3) the Defendant's breach of the contract, and 4) resulting damages. See, Hampshire Properties v. BTA Bldg. and Developing, Inc., 122 A.D.3d 573 [2d Dept. 2014]; Vision China Media, Inc. v. Shareholder Representative Services, LLC, 109 A.D.3d 49, 58 [1st Dept. 2013]; New York State Worker's Compensation Bd.v. SG Risk, LLC, 116 A.D.3d 1148, 1153 [3d Dept. 2014].

Further, it is well settled that in order for Plaintiff to state a cause of action for breach of contract, Plaintiff's allegations must identify the provisions of the contract that were breached. See, Barker v. Time Warner Cable, Inc., 83 AD.3d 750, 751 [2d Dept. 2011]; New York City Educational Const. Fund v. Verizon New York, Inc., 114 A.D.3d 529 [1st

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Dept. 2014]. Lastly, unless Plaintiff's proof clearly demonstrates damages, there can be no breach of contract. See, Milan Music, Inc. v. Emmel Communications Booking, Inc., 37 A.D.3d 206 [1st Dept.].

In the case at bar, the Plaintiff has proven the existence of a contract with the Defendant (Exh. 5) and that he has complied with all of his contractual obligations under said contract (Exh. 2). The Court finds, based on the documentary evidence presented in this case, that the Defendant breached its contractual obligation to the Plaintiff when it re-allocated his pre-modification principal or forgiveness to excess interest due and to the escrow account (Exh. 4). There is simply no language in any provision or paragraph of either the H.A.M.P. loan or any other documents admitted into evidence that would contractually authorize the Defendant to re-allocate the principal forgiveness to interest and/or escrow.

The Court is curious, however, as to why the Plaintiff waited three years to commence this cause of action for breach of contract¹ and curious as to why he did not address the service and filing of the IRS 1099 Form with the IRS, particularly if he believed that the Defendant never forgave his pre-modification principal in the sum of \$1,207.04.

In any event, the Plaintiff has not identified any provision of the

¹ The Court is fully aware that the statute of limitations for a breach of contract claim is 6 years. See C.P.L.R. §213(2). However, the Court is not persuaded that the Plaintiff would have waited so long had he actually believed that he did not receive principal forgiveness.

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H.A.M.P. loan or any other documents admitted into evidence that prohibited the Defendant from re-allocating the principal forgiveness to interest and escrow. Hence, the Plaintiff's cause of action for breach of contract fails on this ground. See, Barker v. Time Warner Cable, Inc., *supra*.

Further, since the Plaintiff has utterly failed to show how the re-allocation of the principal forgiveness to interest and escrow on his H.A.M.P. loan damaged him in any regard (Defendant merely forgave the principal on a prior loan and then reapplied that money to a current loan that the Plaintiff has with the Defendant), he has failed to state a cause of action for breach of contract. See, Milan Music, Inc. v. Emmel Communications Booking, Inc., *supra*.

Based on the aforesaid and, in the interest of substantial justice in accordance with the rules and principles of substantive law, the complaint is dismissed.

Ordered, that the small claims complaint is dismissed.

This constitutes the decision and order of the Court.

Hon. Reginald J. Johnson
City Court Judge

Dated: Peekskill, NY
February 19, 2016

Order entered in accordance with the foregoing on this ____ day of
February, 2016.

Concetta Cardinale
Chief Clerk

To: Joseph Stavrou
78 Gallows Hill Road
Cortlandt Manor, New York 10567

Wells Fargo Bank, N.A.
920 South Street
Peekskill, New York 10566