SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JENNIFER G. SCHECTER **PART** IAS MOTION 54EFM

Justice

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ANDREW SAN MARCO,

Plaintiff,

- v -

CONSUMERS FEDERAL CREDIT UNION, STEPHEN JACOBY

Defendants.

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INDEX NO. 651444/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14-20, 22, 24-36 were read on this motion to DISMISS.

Defendants Consumers Federal Credit Union (CFCU) and Stephen Jacoby move, pursuant to CPLR 3211(a)(1), (5) and (7), to dismiss the Verified Complaint (VC). Plaintiff Andrew San Marco opposes. Defendants' motion is granted in part.

Background

As this is a motion to dismiss, the facts set forth in the VC are assumed true. This action arises from a decades-long banking relationship between CFCU, a credit union that is regulated by the National Credit Union Administration (NCUA) and its CEO Stephen Jacoby on the one side, and plaintiff, a CFCU customer, on the other. Plaintiff became a member of CFCU in 1990 (VC ¶ 4). During the years, plaintiff entered "into several investments and transactions at the behest of CFCU and Jacoby, including real estate transactions" and "came to rely on CFCU and Jacoby for investment advice" (VC ¶¶ 8-9). In 2008, Jacoby and non-party Keith Stone, then a VP of CFCU, informed plaintiff of an opportunity to loan money to non-party Commerce Realty LLC (Borrower) in connection with certain housing investments, structured as a so-called "credit union 90% participation loan" (VC ¶¶ 12, 15). Plaintiff invested more than $2 million dollars ($2,000,000) through a series of agreements, termed "Participation Agreements," between Plaintiff and CFCU (VC ¶ 16).

Under the Participation Agreements, plaintiff acquired a 90 percent interest in certain mortgage loans held by CFCU, which retained ownership of the remaining 10 percent interest (VC ¶ 17). In entering the Participation Agreements, plaintiff attests that he relied on Jacoby's representations "that the underlying loans were a good risk, that CFCU had done necessary due diligence of the loans, that CFCU had done necessary due diligence[,] … that the loans complied with all legal requirements, ... and that CFCU was guaranteeing San Marco's invested principal" (VC ¶ 18). Jacoby allegedly guaranteed plaintiff an 8.75% return on his investment (VC ¶ 19).

In June 2009, plaintiff learned that Borrower had failed to pay real estate taxes on the collateral securing the loans (VC ¶¶ 21-25). Later that year, CFCU provided plaintiff with a memorandum dated November 19, 2009 (Guaranty) signed by its Board of Directors (VC ¶ 26). The Guaranty stated:

> This writing is to confirm that Consumers Federal Credit Union will guarantee any and all of your invested principal (balance without interest on the participation loans) for loans you purchased on Commerce Realty estimated at $1,996,278.13. The final terms will be prepared in an agreement within 15 days (Dkt. 16 at 1 [Guaranty]).

There was no subsequent written guaranty agreement (VC ¶ 30). CFCU began repaying plaintiff in November 2009 (VC ¶¶ 31, 46). Plaintiff alleges that repayments to him were made from other sources, not just from sales of the collateral underlying the participation loans (VC ¶ 47).

Around 2010-2011, Borrower conveyed certain properties underlying the Participation Loans to CFCU to avoid foreclosure. CFCU hired a management company to manage the properties and to collect rent. CFCU also sold off some properties (VC ¶ 32-35).

In late 2010, Jacoby told plaintiff that the NCUA had audited and "disallowed" the Participation Agreements (VC ¶ 36), advising him that NCUA had mandated that CFCU pay plaintiff back immediately (VC ¶ 39). Jacoby did not show plaintiff the written communication, citing privilege and confidentiality concerns (VC ¶ 41). At Jacoby's request, plaintiff agreed to defer his demand for immediate repayment (VC ¶¶ 42-44).

In December 2010, Jacoby informed plaintiff that regulations required CFCU to remove the loans from CFCU's books (VC ¶ 48). Plaintiff signed a letter, dated January 7, 2011, in connection with the loan sale (VC ¶ 49; Dkt. 35 [Commitment Letter]). Plaintiff initialed item # 4 in the Commitment Letter, purporting to waive receipt of "updated due diligence inclusive of cash flows, ability to service the debt and appraisal of underlying collateral" (VC ¶ 51). Plaintiff also signed a "Loan Sale Agreement" dated December 8, 2010 (VC ¶ 50; Dkt. 17 [LSA]).

The LSA provided that CFCU, as seller and "sole beneficial owner and holder of [the] loans," was transferring 100% of its ownership interests in the mortgage loans to purchaser San Marco, and that San Marco would pay the "Purchase Price" (specified as "the aggregate outstanding principal balance owing on the loans") on the January 15, 2011 closing date. CFCU was to continue servicing the loans (Dkt. 17 [LSA] at 1).

Section 4.03 of the LSA states as follows:

> Purchaser acknowledges that it is a sophisticated investor in mortgage loans, that it has sought out all legal counsel and other third parties necessary to adequately assist and advise it in arriving at a decision to purchase the subject loans and the price to be paid. It has, among other steps, fully and completely reviewed all loan files, records, statements and correspondence in the possession of Seller, in forming an opinion and conclusion as to the purchase of the loans (*id.* at 3).

Section 4.07 of the LSA provides:

> This document contains the entire agreement between the parties hereto as to the transfer of the loans, and cannot be modified in any respect except by an agreement in writing. The invalidity or unenforceability of any portion of this Agreement will in no way affect the balance thereof. This Agreement will remain in effect until the loans sold hereunder are repaid or no longer an asset of the Purchaser (*id.*).

Notwithstanding the language in the LSA, Jacoby represented to plaintiff that the LSA would not alter plaintiff's rights with respect to the Participation Loans and the Guaranty, and assured plaintiff that he did not need an attorney because CFCU and its attorneys were protecting his interests (VC ¶ 51). Plaintiff alleges that he never received a countersigned copy of the LSA or Commitment

Letter, interest payments, or the monthly payments or reports required by the Commitment Letter (VC ¶ 52). Plaintiff also alleges that the loan sale never closed and that he never made the $1,825,000 payment (VC ¶ 52). Plaintiff also attests that he did not consult his own attorney in connection with the LSA (Dkt. 24 [San Marco Aff.] ¶ 20).

Plaintiff alleges, moreover, that CFCU continued to make "repayments" to him from November 2009 through December 20, 2018 (VC ¶ 60). Jacoby continued to reassure plaintiff that he would be repaid in full (VC ¶¶ 60-61). As of February 14, 2012, CFCU represented that it owed plaintiff $1,520,000 in principal (VC ¶ 62). As of January 28, 2014, CFCU represented it owed plaintiff $1,384,840 in principal (VC ¶ 63). In April 2014, following a $250,000 principal payment, CFCU represented it owed plaintiff $900,000 in principal (VC ¶ 64). Defendants allegedly continued, from April 2014 through 2017, to make smaller payments to plaintiff from specified sources in which he did not hold any ownership or investment interests (VC ¶¶ 65-75).

On September 16, 2016, Jacoby emailed plaintiff, representing that $595,147.39 remained outstanding (VC ¶ 76). In early 2018, plaintiff demanded full repayment on the loans (VC ¶¶ 78-81). In mid-2018, Jacoby advised plaintiff that the balance owed to him was now $507,768.53 (VC ¶ 83). On October 2, 2018, plaintiff again requested repayment in full (VC ¶¶ 85-87). On November 23, 2018, plaintiff texted Jacoby, requesting an in-person meeting (VC ¶ 89). By email dated December 20, 2018, Jacoby purported to disclaim any obligation on the remaining unpaid balance (VC ¶ 94). Jacoby's email, however, admitted that "[o]n November 11, 2009, the Credit Union's Board of Directors gave you a $1.996 million guarantee on your invested principal" (VC ¶ 94). The email is alleged to have claimed that the "final agreement" contemplated by the Guaranty was, in fact, the LSA (executed over a year later), which rendered the Guaranty inoperative (VC ¶ 94). It concluded as follows:

> We apologize for any confusion. The Credit Union could not make an agreement that would have allowed you to sell the collateral for the lowest price with the comfort that

> all shortfalls would be paid by the Credit Union. The 2011 LSA does not obligate the Credit Union to any guarantee to make any loan shortfall payments (VC ¶ 94).

Plaintiff attests that upon receipt of this email, "he realized for the first time, Defendants had defrauded him" (VC ¶ 95).

Plaintiff asserts the following causes of action in the VC, numbering them as follows: (1) fraud and fraudulent inducement of the Participation Agreements against defendants; (2) negligence and gross negligence against defendants; (3) breach of fiduciary duty against defendants; (4) breach of the Participation Agreements against CFCU; (5) breach of the Guaranty against CFCU; (6) fraudulent inducement of the LSA against defendants; (7) declaratory judgment voiding the LSA. San Marco seeks damages of at least $507,079.45 in alleged outstanding principal, plus interest (at least $1,215,000, as of December 31, 2018), costs and punitive damages.

Discussion

On a motion to dismiss, the facts alleged in the pleading are accepted as true, as are all reasonable inferences in the proponent's favor that may be gleaned from them (*see Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]; *Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration" (*Skillgames*, 1 AD3d at 250). Dismissal must be denied if the pleading sets forth a viable cause of action (*see id.*). Deficiencies in the pleading, moreover, may be remedied by proper affidavits (*see Amaro*, 60 AD3d at 492; *see also Leon v Martinez*, 84 NY2d 83, 88 [1994]). Under CPLR 3211(a)(1), a motion to dismiss will be granted if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002], citing *Leon*, 84 NY2d at 88 [1994]).

Where dismissal is sought based on documentary evidence under CPLR 3211(a)(1), the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*id.*). "To qualify as 'documentary,' the paper's content must be 'essentially undeniable and …, assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based" (*Amsterdam Hospitality Group., LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 432 [1st Dept 2014], quoting Siegel, Practice Commentaries, McKinney's Cons Laws of N.Y., Book 7B, CPLR § 3211). Affidavits do not ordinarily qualify as documentary evidence (*id.* at 433).

Fraud and Fraudulent Inducement of Participation Agreements and Subsequent Agreements (First Cause of Action)

Plaintiff alleges that Jacoby made the following statements, which were false when made, and fraudulently induced plaintiff's entry into the Participation Agreements, the Guaranty and the LSA (VC ¶ 107):

a. "that the CFCU had fully vetted the Participation Agreements and done all appropriate due diligence on Commerce and its principals"

b. "that CFCU had done the necessary due diligence with respect to each of the Participation Loans"

c. "that the Participation Loans complied with all legal requirements"

d. "that the Participation Loans were approved by the NCUA and in compliance with all NCUA regulations"

e. "that the Participation Loans were safe, low-risk investments"

f. "that CFCU would guarantee any and all of San Marco's invested principal for the loans he had participated in"

Fraud requires "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Fraud claims must be pleaded with specificity under CPLR 3016(b) (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491–92 [2008]).

Statement (f), as a statement about the future, is not actionable as fraud (*see International Fin. Corp. v Carrera Holdings Inc.*, 82 AD3d 641, 641-42 [1st Dept 2011]; *Sidamonidze v Kay*, 304 AD2d 415, 416 [1st Dept 2003]; *see also Adams v Clark*, 239 NY 403, 410 [1925]). Representations of present intentions may constitute fraudulent statements of material existing fact (*see Laduzinski v Alvarez & Marsal Taxand LLC*, 132 AD3d 164, 168-169 [1st Dept 2015]; *see also Sabo v Delman*, 3 NY2d 155, 160 [1957]). Plaintiff, however, does not plead facts sufficient to show that CFCU never intended to guarantee the principal on plaintiff's investment (*see Lanzi v Brooks*, 54 AD2d 1057, 1058 [3rd Dept 1976], *affd* 43 NY2d 778 [1977]; *see also Stuart Lipsky, P.C. v Price*, 215 AD2d 102, 103 [1st Dept 1995]). In fact, plaintiff alleges that defendants strove to make payments on the guaranty as late as 2018.

As to the remaining alleged fraudulent statements, the first cause of action is time-barred. "An action in New York based upon fraud must be commenced within the greater of six years from the date of the fraud or within two years from the time plaintiffs discovered, or with reasonable diligence, could have discovered, the fraud" (*MBI Intl. Holdings Inc. v Barclays Bank PLC*, 151 AD3d 108, 114 [1st Dept 2017], citing CPLR 213[8]). The parties entered into the Participation Agreements in 2009. Plaintiff failed to allege facts showing that he could not have discovered the misrepresentations had he exercised reasonable diligence (*see MBI Intl. Holdings*, 151 AD3d at 114; *Gutkin v Siegal*, 85 AD3d 687, 688 [1st Dept 2011]; *Gonik v Israel Discount Bank of N.Y.*, 80 AD3d 437, 438 [1st Dept 2011]). In fact, plaintiff admits that he became aware of Borrower's delinquencies as early as 2009 (VC ¶ 22), prompting him to demand that CFCU make a guaranty in writing. Accordingly, he was placed on notice that representations (a), (b) and (e), above, were untrue (*see Cusimano v Schnurr*, 137 AD3d 527, 531 [1st Dept 2016] [plaintiff is held to have discovered the fraud upon having knowledge of facts from which it could be reasonably inferred]; *MBI Intl. Holdings*, 151 AD3d at 110 [explaining when duty of inquiry arises]). As to statements (c) and (d), plaintiff was placed on

notice that the Participation Agreements were not in legal or regulatory compliance in late 2010, when plaintiff alleges that Jacoby told him that the loans had been "disallowed" by a NCUA audit (VC ¶ 36).

Defendants cannot be equitably estopped from asserting a statute of limitations defense in the absence of allegations of reasonable reliance on "subsequent and specific actions" by defendants preventing plaintiff from bringing timely suit (*Zumpano v Quinn*, 6 NY3d 666, 674 [2006]). Moreover, the same misrepresentations cannot be used for both a cause of action for fraud and an attempt to toll its limitations period (*see Knobel v Shaw,* 90 AD3d 493, 494-495 [1st Dept 2011]). Plaintiff does not sufficiently allege facts from which it may be reasonably inferred that any of defendants' statements or acts after the purported fraud consisted of "fraud, misrepresentations or deception" for the purpose of inducing him not to file timely suit. The first cause of action is therefore dismissed.

Negligence and Gross Negligence (Second Cause of Action)

As to the second cause of action, plaintiff alleges that defendants "had a duty to San Marco [to] service the Commerce loans and to properly undertake all acts relating to the underlying Participation Agreements, as well as to collect and distribute amounts repayable under the underlying loans and monitor the conduct and actions of Borrowers Commerce and its principals" (VC ¶ 121). "In order to prevail on a negligence claim, 'a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom'" (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016], *rearg denied*, 28 NY3d 956 [2016], quoting *Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]).

Even to the extent defendants owed plaintiff a duty of due care in administering and servicing the loans, plaintiff does not allege a breach of that duty or causation of injury in a nonconclusory manner. Plaintiff does not identify what acts defendants took or failed to take that caused plaintiff

any injury. He does not allege what defendants were duty bound to do or refrain from doing in servicing the Participation Agreements and how any purported breach of that duty caused San Marco's damages. The second cause of action is therefore dismissed.

Breach of Fiduciary Duty (Third Cause of Action)

As to the third cause of action, plaintiff asserts that a "fiduciary relationship existed" because of "the trust and confidence developed over the almost 20-year relationship [with] CFCU" (VC ¶ 129) and that the parties stood in a "de facto partnership and joint venture" due to the Participation Agreements (VC ¶ 130). Plaintiff also alleges that defendants gave him "investment advice … in connection with the Participation Agreements" and was plaintiff's agent in servicing and distributing amounts re-payable under the loans (VC ¶ 130). Plaintiff asserts that defendants breached their fiduciary duties by (1) misrepresenting the legality of the Participation Agreements; (2) failing to properly monitor and service the loans underlying the Participation Agreements; (3) concealing the true nature and extent of Borrower's misconduct in connection with the loans; and (4) deceiving plaintiff through fraudulent misrepresentations and concealment with respect to the NCUA's requirements and oversight of the subject Participation Agreements and the underlying loans (VC ¶ 131).

Breach of fiduciary duty requires "a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct" (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). The pleading must meet a heightened standard under CPLR § 3016(b) (*Swartz v Swartz*, 145 AD3d 818, 823 [2d Dept 2016]). "A fiduciary relationship 'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation'" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005], quoting Restatement [Second] of Torts § 874, Comment *a*). "In determining whether a fiduciary relationship exists, 'a court will look to whether a party reposed confidence in another and reasonably relied on

the other's superior expertise or knowledge'" (*Sergeants Benev. Assn. Annuity Fund v Renck*, 19 AD3d 107, 110 [1st Dept 2005], quoting *Wiener v Lazard Freres & Co.*, 241 AD2d 114, 122 [1st Dept 1998]). The existence of a fiduciary relationship is informed by, but does not solely hinge upon, contracts or agreements between the parties (*EBC I*, 5 NY3d at 20).

A fiduciary relationship requires "a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" (*id.* at 19 [2005]). Accordingly, the claim is not viable where "the complaint alleges only arm's length business transactions and no special circumstances that might give rise to a fiduciary relationship" (*see Benzies v Take-Two Interactive Software, Inc.*, 159 AD3d 629, 630-631 [1st Dept 2018]). Relationships between banks and customers are not typically fiduciary in nature (*see Greenberg, Trager & Herbst, LLP v HSBC Bank USA*, 73 AD3d 571, 572 [1st Dept 2010], *affd*, 17 NY3d 565 [2011]; *Nathan v J & I Enterprises, Ltd.*, 212 AD2d 677, 677 [2d Dept 1995]).

Plaintiff fails to allege sufficient facts to establish that defendants owed fiduciary duties to plaintiff in monitoring and servicing the loans and disbursing payments to plaintiff independent of CFCU's contractual obligations (*see Superior Officers Council Health & Welfare Fund v Empire HealthChoice Assur., Inc.*, 85 AD3d 680, 682 [1st Dept 2011] [upholding dismissal due to lack of any duty independent of the parties' agreement], *affd* 17 NY3d 930 [2011]). Regardless, allegations that defendants failed to "properly" monitor and service the loans underlying the Participation Agreements are conclusory.[1] Further, assertions that defendants concealed misconduct by the

[1] Plaintiff attests that he was not provided adequate documentation from CFCU relating to the loans that he purchased and that CFCU is servicing (VC ¶¶ 82, 84; Dkt. 24 [San Marco Aff.] ¶¶ 4, 5). Plaintiff may move to amend its complaint to enforce CFCU's ***contractual*** obligations, if appropriate, after obtaining the relevant documents (which relate to whether CFCU made payments based on a guaranty or based on contractual obligations) through discovery.

Borrowers are belied by plaintiff's admission that the tax delinquency issue was brought to plaintiff's attention in mid-2009, more than a year before plaintiff signed the LSA (VC ¶¶ 21-25).[2]

The allegations, moreover, are insufficient to suggest a fiduciary relationship in rendering investment or legal advice. The length of the relationship and the mere touting of investment opportunities to plaintiff are insufficient in the absence of non-conclusory allegations that plaintiff reposed trust and confidence in defendants' superior expertise or knowledge (*see Gaidon v Guardian Life Ins. Co. of Am.*, 255 AD2d 101, 101-102 [1st Dept 1998]). Allegations of marketing statements on CFCU's website are also insufficient (*see Coöperative Centrale Ratffeisen-Boerenleenbank, B.A. v Atradius Credit Ins.*, 149 AD3d 416, 416-417 [1st Dept 2017]; *Batas v Prudential Ins. Co. of Am.*, 281 AD2d 260, 264 [1st Dept 2001]). There are no pleaded facts—as opposed to bare legal conclusions—that would render the parties' relationship as anything other than contractual. The third cause of action for breach of fiduciary duty is therefore dismissed.

Breach of Participation Agreements (Fourth Cause of Action)

For the fourth cause of action against CFCU, plaintiff asserts that CFCU breached the Participation Agreements by failing to properly oversee, monitor and service the underlying loans (VC ¶ 141). Defendants argue that the VC fails to describe the allegedly breaching conduct, the provisions that were breached and which of the Participation Agreements were breached (*see Marino v Vunk*, 39 AD3d 339, 340 [1st Dept 2007]; *Gordon v Curtis*, 68 AD3d 549, 550 [1st Dept 2009]; *Sebro Packaging Corp. v S.T.S. Indus., Inc.*, 93 AD2d 785, 785 [1st Dept 1983]; *Kramer v Carl M. Loeb, Rhoades & Co.*, 20 AD2d 634, 634 [1st Dept 1964]). Allegations about the investments' poor performance (e.g., delinquency on Borrowers' property taxes) are insufficient to state a claim that CFCU breached its servicing obligations. Nor does plaintiff allege what the Participation Agreements

[2] To the extent that alleged misrepresentations or concealment ending in 2009 harmed plaintiff, the statute of limitations bars the action, as explained in connection with the first cause of action.

obligated CFCU to do and how CFCU breached its obligations. Additionally, the VC does not contain factual allegations supporting any breach of the Participation Agreements within the past six years (*see Carlingford Ctr. Point Assoc. v MR Realty Assoc., L.P.*, 4 AD3d 179, 180 [1st Dept 2004]). The fourth cause of action is therefore dismissed.

Breach of the Guaranty (Fifth Cause of Action)

As to the fifth cause of action, plaintiff asserts that CFCU breached the Guaranty in 2018 by stopping its repayments in contravention of the agreement. Though the Guaranty contemplated that "final terms" would "be prepared in an agreement within 15 days" (Dkt. 16 [Guaranty] at 1), that language does not conclusively establish that CFCU did not intend to be bound by the Guaranty itself without a further agreement on other additional terms (*see Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014]; *Conopco, Inc. v Wathne Ltd.*, 190 AD2d 587, 588 [1st Dept 1993]). Nor have defendants identified any missing terms that are material as a matter of law (*see Sustainable PTE Ltd. v Peak Venture Partners LLC*, 150 AD3d 554, 555 [1st Dept 2017]). Defendants assert that the Guaranty is unenforceable because it violated NCUA regulations, violated the statute of frauds and was superseded by the LSA.

First, defendants do not establish that the Guaranty is void for illegality. Defendants argue that the Guaranty violated 12 CFR § 701.20(c)(2) by failing to provide "a fixed dollar amount and a specified duration." Defendants also point to CFCU's own failure to "obtain a segregated deposit from the member that is sufficient in amount to cover the federal credit union's potential liability." Defendants cite no apposite authority for the proposition that CFCU's violation of law extinguished its contractual obligations absent evidence of plaintiff's complicity.[3]

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[3] *Riverside Syndicate, Inc. v Munroe* (10 NY3d 18, 22, 24 [2008]), is distinguishable as the regulatory provision at issue in that case expressly voided the agreement ab initio (*see* NY RENT STAB § 2520.13). *Bonilla v Rotter* (36 AD3d 534, 535 [1st Dept 2007]) and *Valenza v Emmele Coutier, Inc.* (288 AD2d 114, 114 [1st Dept 2001]) are also inapposite because the parties actually committed a crime in entering into the contracts (fee-sharing and tax fraud, respectively).

Next, defendants argue that the Guaranty's recital of past consideration—i.e., "loans you purchased on Commerce Realty estimated at $1,996,278.13"—was too "vague" and "imprecise" to be enforceable. In *Korff v Corbett*, which defendants cite, the plaintiff had conceded that no past consideration was recited at all in the alleged guaranty agreement (155 AD3d 405, 408 [1st Dept 2017]). Here, however, the description of past consideration is sufficiently precise, as defendants allegedly used nearly the same verbiage in a later email repudiating the earlier guaranty (VC ¶ 94).

Finally, defendants fail to conclusively prove that the LSA superseded the Guaranty or extinguished defendants' obligations thereunder.[4] It is generally true that "a subsequent contract regarding the same matter will supersede the prior contract" (*Hyuncheol Hwang v Mirae Asset Secs. (USA) Inc.*, 165 AD3d 413, 413 [1st Dept 2018], quoting *Applied Energetics, Inc. v NewOak Capital Markets, LLC*, 645 F3d 522, 526 [2d Cir 2011]), especially in the presence of a merger clause (*see Pate v BNY Mellon-Alcentra Mezzanine III, LP*, 163 AD3d 429, 429-430 [1st Dept 2018]). Defendants have not conclusively shown, however, that the LSA is operative and that it displaces the Guaranty (Dkt. 17 [LSA] at 3 ["This document contains the entire agreement between the parties hereto ***as to the transfer of the loans***"]; *see LaRosa v Arbusman*, 74 AD3d 601, 603 [1st Dept 2010]). Indeed, defendants' continued assurances and performance under the Guaranty, as alleged by plaintiff, could support plaintiff's position that the LSA failed to supersede the Guaranty or even to bind the parties altogether. The fifth cause of action survives the motion.

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[4] *Bier Pension Plan Trust v Estate of Scheierson* (74 NY2d 312, 316 [1989]), cited indirectly by defendants, says that "a creditor and the principal debtor may not alter the surety's undertaking to cover a different obligation without the surety's consent." It is not apposite here, because CFCU consented to the LSA. Two other cases directly cited by defendants, *Flexi-Van Leasing, Inc. v Isaias* (23 F Supp 2d 419, 424 [SDNY 1998]) and *Varick Drywall v Aniero Concrete Co.* (237 AD2d 348, 349 [2d Dept 1997]) stand for similar propositions and are likewise inapposite.

Fraudulent Inducement of the LSA (Sixth Cause of Action)

As to the sixth cause of action, plaintiff asserts that Jacoby made three false representations to induce him to enter the LSA and to initial item # 4 in the Commitment Letter, purportedly waiving receipt of "updated due diligence inclusive of cash flows, ability to service the debt and appraisal of underlying collateral" (VC ¶ 150):

a) The LSA was a formality required to meet NCUA requirements;

b) The LSA would not alter plaintiff's rights or obligations, including with respect to the Participation Loans and the 2009 Guaranty; and

c) CFCU's attorneys were protecting plaintiff's interests.

Even if any alleged statements of present fact were knowingly untrue when defendants made them, and even if reliance on certain statements—such as Jacoby telling San Marco that CFCU's attorneys were looking out for San Marco—could somehow be deemed justifiable (particularly in light of the fact that according to San Marco himself he was engaged in a sham to hide the true circumstances from regulators), the sixth cause of action is time-barred, more than six years having elapsed since plaintiff signed the LSA. The two-year discovery rule is of no help either, as plaintiff could have conducted reasonable diligence immediately after (or before) entering into the LSA. No post-LSA conduct by defendants is alleged that gave rise to equitable estoppel, as discussed in connection with the first cause of action, above. The sixth cause of action is therefore dismissed.

Declaratory Judgment Voiding the LSA (Seventh Cause of Action)

Plaintiff seeks a declaration that the LSA is null and void for lack of consideration and for lack of meeting of the minds, arguing that none of the LSA provisions "were ever performed because they were never intended to be performed" despite execution of the alleged sham contract (VC ¶ 162). CFCU, in contrast, contends that payments to San Marco were made pursuant to the LSA and not the Guaranty. Because the issue of whether the LSA defeats plaintiff's claims under the Guaranty will be addressed in this action, there is no need for a declaratory judgment and the claim is dismissed as

"unnecessary and inappropriate" (*NMC Residual Ownership LLC v US Bank Nat. Assn.*, 153 AD3d 284, 290 [1st Dept 2017]; *Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 54 [1st Dept 1988]). Accordingly, it is

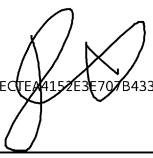
ORDERED that defendants' motion to dismiss is granted in part, and the first, second, third, fourth, sixth and seventh causes of action are dismissed as against defendant Consumers Federal Credit Union, and the action is dismissed in its entirety as against defendant Stephen Jacoby, and the motion is otherwise denied; and it is further

ORDERED that the caption be amended to reflect the dismissal of the complaint as against defendant Stephen Jacoby and that all future papers filed with the court shall bear the amended caption; and it is further

ORDERED that defendants shall, within 21 days of this decision and order, serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)]; and it is further

ORDERED that within 30 days, plaintiff's counsel shall contact chambers (mrand@nycourts.gov), cc-ing defendants' counsel, to schedule a telephonic preliminary conference (PC), and a joint status letter will be due by e-filing and by email one week before the PC.



8/17/2020
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION

[ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER

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