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Aurora Loan Servs., LLC v Arauz
2013 NY Slip Op 50894(U)
Decided on May 29, 2013
Supreme Court, Kings County
Schmidt, J.
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Decided on May 29, 2013

Supreme Court, Kings County

Aurora Loan Services, LLC,, Plaintiff,

against

Humberto Arauz, HUGO VACCARIS, CARNEGIE CAPITAL, LLC, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC as nominee for LEHMAN BROTHERS BANK, FSB, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, JOHN DOE (Said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest in or lien upon the mortgaged premises.), Defendants.

32973/09

Plaintiff Attorney: Jordan Smith, Esq., Akerman Senterfitt, LLP, 335 Madison Avenue, 26th Fl., New York, NY 10017

Defendant Attorney: Paladino Law Group, P.C., 320 Nassau Blvd., Ste. 4, Garden City South, NY 11530

David I. Schmidt, J.

Defendant Humberto Arauz (Arauz), as both borrower and mortgagor, duly executed a promissory note and mortgage for $500,000.00 on June 1, 2007. The promissory note named Lehman Brothers Bank, FSB (Lehman Brothers) as lender/payee and the mortgage named MERS as nominee for Lehman Brothers as mortgagee. The mortgage was duly recorded in the City Registrar's Offices on July 25, 2007 under file number 2007000383400 covering the premises located at 1285 Jefferson Avenue, Brooklyn, New York. Arauz executed a subordinate note and mortgage simultaneously with the aforementioned instruments, also in favor of Lehman Brothers and MERS, but this action only involves seeking to foreclose the above referenced primary mortgage.

Arauz, according to the complaint, defaulted under both the note and mortgage by failing to pay the monthly PITI [FN1] payments due beginning June 1, 2008 and each month thereafter. Arauz retained an attorney and sought to sell the property with Aurora's permission, as loan servicer, by short sale. Arauz contracted on or about July 31, 2008 to sell the property to Vivianna Moncayo (Ms. Moncayo), a nonparty, for $325,000.00. A copy of the sales contract, Arauz's financials and a proposed HUD-1 statement were sent to Aurora for review. Aurora sent Arauz's counsel a denial letter, on or about September 24, 2008, which stated that the offer did not meet the eligibility criteria established by the Federal National Mortgage Association (Fannie Mae), the mortgages' investor. The offer was deemed too low by Aurora's representative to submit to Fannie Mae for approval according to Aurora's internal notes and based upon a broker's price opinion (BPO) letter generated after internal and external observation of the premises. The property, according to this BPO letter, was worth approximately $480,000.00, but had dropped thirty percent in value since the June 1, 2007 closing.

Arauz's counsel contacted Aurora, on or about October 24, 2008 and after receipt of the denial letter, and requested that Aurora reconsider the denial. Counsel claimed that the BPO was both unreliable and overinflated. In addition, counsel requested that Aurora authorize and finance a full interior appraisal of the premises by a licensed appraiser. Aurora's representative advised counsel that its policies and procedures did not permit such an appraisal. Arauz's counsel also inquired about the comparable foreclosure listings submitted by his offices on October 3, 2008 and whether or not the underwriter had received and reviewed them. Aurora's representative noted, in response, that the premises were not in active foreclosure. Aurora received a report from Fannie Mae three days later containing an authorization to commence foreclosure proceedings against Arauz.

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Aurora kept this matter on a dual track for the next several months. It prepared for foreclosure by ordering a title report, the security instruments and the promissory note, [*2]serving a "ninety day" letter [FN2] and having its collection department call Arauz on a daily basis while concurrently sending three separate "Hope Now" letters [FN3] to him requesting documentation for either a loan modification or short sale. Aurora received a fourteen page fax on January 28, 2009 and a sixty-six page fax on January 30, 2009 in response. It denied Arauz a loan modification on February 4, 2009 based upon his submitted documents. It further appears that Aurora denied a short sale request that same day due to a missing proposed HUD-1 statement.

Arauz's counsel called Aurora on February 13, 2009 to determine the short sale application status, and Aurora advised counsel about the missing HUD-1 statement. Aurora acknowledged receipt of a three page fax, presumably the missing HUD-1 statement, on February 17, 2009. Arauz's counsel contacted Aurora on February 19, 2009 and advised a representative, designated as "F60," that Ms. Moncayo had increased her offer to $360,000.00. Aurora's representative ordered a new BPO, which Aurora received on March 6, 2009. The property had dropped another $130,000.00 in value since September, 2008, according to the BPO, which left the property worth $350,000.00, or ten thousand dollars less than the new offer. The projected net proceeds of the sale, therefore, represented ninety-two percent (92%) of this new BPO.

The deposition testimony of Robert Mennonoh, Aurora's assigned "loan resolution counselor," acknowledged that Fannie Mae would advise Aurora about the "bottom line" Fannie Mae would accept on a short sale and usually stated such bottom line as a specific amount or a percentage of the BPO. If the pending offer would generate a net payoff greater than "Fannie's floor" or bottom line, Aurora could approve the short sale without further notice to Fannie Mae. Arauz's counsel, according to Aurora's records, received notice on March 17, 2009 that Aurora still awaited Fannie Mae's approval. Fannie Mae notified Aurora three days later that it approved the short sale offer of $360,000.00, with a net of $320,285.00 to satisfy the subject primary mortgage and $2,000.00 to satisfy the subordinate mortgage.

(3)

Mr. Mennonoh, upon receiving this notice of approval, handed his notes and physical file to an assistant, identified as "Andrew" and designated "F70" by Aurora, to prepare the conditional acceptance or approval letter to send to Arauz's counsel. No dispute exists that Andrew, in preparing this letter on his computer, mistakenly inserted $196,850.00 in the acceptance letter as the purchase price with a net payoff of the first lien of $171,964.28 and $3,000.00 to satisfy the subordinate lien. These payoff amounts [*3]were apparently taken from another Fannie Mae short sale approval for a property located in Maryland. The letter, dated March 20, 2009, stated that "closing must be completed no later than April 28, 2009" and was issued in the regular course of plaintiff's business.[FN4]

Arauz's counsel, upon receiving the letter on or about March 24, 2009, called Aurora and spoke to a representative, designated "A75," from the collections department. Counsel acknowledged receipt of the approval letter and wanted to "go over" the letter. This agent printed her own copy of the approval letter, verified the mistaken terms and even faxed another copy to counsel. Arauz's counsel called Aurora on April 21, 2009, spoke to a representative, designated as "G24," and verified the borrower's name and property address associated with the payoff letter.

Additionally, counsel requested an extension of the April 28, 2009 closing deadline. Aurora noted the request but took no action on it at that time. That same day, April 21, 2009, Arauz and Moncayo executed an amendment to the original contract lowering the sales price from $360,000.00 to $196,850.00.

Arauz's counsel faxed a written request to Aurora on May 4, 2009 reiterating his request to extend the April 28, 2009 closing date. Counsel called Aurora the next day and was advised that his extension request was granted. Aurora's May 7, 2009 letter, faxed to the office of Arauz's counsel, in fact, retroactively extended the closing date to May 28, 2009. This letter contained the same mistaken terms, properly identified the seller as Humberto Arauz and misidentified the buyer as Vivianna Noncayo (sic).

(4)

The following day, May 8, 2009, Aurora received a twelve page fax from counsel's office. This fax indisputably contained an assignment of the sales contract from the purchaser, Ms. Moncayo, to her brother-in-law, movant-defendant Hugo Vaccaris, with Arauz's approval. However, Aurora disputes whether this fax contained the April 21, 2009 amendment reducing the sales price. Aurora's notes and records indicate that Andrew, its representative, reviewed and verified this fax and noted a "new buyer with all (sic) same terms received."[FN5] A third approval letter, according to Aurora's records, was printed on May

15, 2009.[FN6] This letter mirrored the prior letters except it substituted Vaccaris as purchaser in lieu of Ms. Moncayo. Each of these three letters, indisputably, were personally signed by Mr. Mennonoh on Aurora's behalf.

(5)

A closing took place on May 27, 2009 in accordance with the third approval letter. [*4] Two Citibank official checks were produced and tendered to the title company to satisfy the primary and subordinate mortgage liens. A HUD-1 statement was also prepared and faxed to Aurora in accordance with Mr. Mennonoh's May 11, 2009 fax cover sheet instructions. The checks arrived in Littleton, Colorado addressed to Mr. Mennonoh, as directed in the approval letter. Mr. Mennonoh, upon receipt of these checks, reviewed the physical file for the first time since March 20, 2009, and discovered the errors while entering the closing information into Fannie Mae's system. Aurora, through counsel, returned the checks to the title company and claimed that it did not agree to accept these mistaken amounts to satisfy the mortgages. Aurora commenced a foreclosure action on June 8, 2009 under Kings County Clerk's index number 14044/2009 and also filed a lis pendens against the property. The deed from defendant Arauz to defendant Vaccaris was filed with the New York City Registrar's offices on June 8, 2009 as well.

Arauz subsequently moved in that earlier foreclosure action, by emergency order to show cause, for a preliminary injunction barring Aurora from making derogatory credit-reporting comments against him and compelling Aurora to concurrently (a) accept the short sale proceeds and (b) issue satisfactions for both mortgages. This court's September 22, 2009 decision and order denied the application as Arauz was not seeking to maintain the status quo pending that foreclosure action, but instead sought the ultimate relief he could obtain against Aurora. Thereafter, plaintiff moved to voluntarily discontinue that action and subsequently commenced the instant action naming Hugo Vaccaris one of the defendants herein.

Discussion

Defendant's Summary Judgment Motion

(1)

Summary judgment is a drastic remedy and should be granted only when it is clear that no triable issues of fact exist (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). The moving party bears the burden of prima facie showing its entitlement to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts (*see* CPLR 3212 [b]*; Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]). Failing to make that showing requires denying the motion, regardless of the adequacy of the opposing papers (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 502 [2012]*; Ayotte v Gervasio*, 81 NY2d 1062 [1993]). Making a prima facie showing, then shifts the burden to the opposing party to produce sufficient evidentiary proof to establish the existence of material factual issues (*see Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Accordingly, issue-finding rather than issue-determination is the key in deciding a summary judgment motion (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, [1957], *rearg denied* 3 NY2d 941 [1957]). "The court's function on a motion for summary judgment is to determine whether material factual issues exist, not resolve such issues" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010] [internal quotation marks omitted]).

Evidence presented by the non-moving party "must be viewed in the light most favorable to the non-moving party" (*see Vega*, 18 NY3d at 503 [internal quotation marks omitted]). Denial thus occurs "where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Benetatos v Comerford*, 78 AD3d 750, 752 [2010] [internal quotation marks omitted]; *see also Peerless Ins. Co. v Allied Bldg. Prods. Corp.*, 15 AD3d 373, 374 [2005] [denial of summary judgment required upon developing "any doubt as to the existence of a triable [*5]issue, or where the material issue of fact is arguable"] [internal quotation marks and citations omitted]).

(2)

Plaintiff commenced this action seeking to foreclosure upon the aforementioned primary mortgage lien. Defendants Arauz and Vaccaris were served and appeared by separate counsel who served separate answers raising identical affirmative defenses and counterclaims. Plaintiff, in turn, served a reply to the counterclaims and raised several affirmative defenses as well. Some discovery ensued, particularly Mr. Mennonoh's deposition and document exchange, and Vaccaris, as the record owner of the property, made the instant summary judgment application based on his asserted counterclaims and affirmative defenses.

Vaccaris asserts nine affirmative defenses: 1) accord and satisfaction; 2) unclean hands; 3) waiver, laches, ratification and/or estoppel; 4) failure to state a cause of action for foreclosure; 5) abuse of process; 6) contributory negligence; 7) lack of good faith and fair dealing; and applications of both the 8) parole evidence rule and 9) statute of frauds. The evidence adduced shows that abuse of process, unclean hands, lack of good faith and the statute of frauds are inapplicable to this matter. More specifically, Vaccaris has made no showing that Aurora acted in a perverted manner with a collateral objective in proceeding with the foreclosure action (*see Wilner v Village of Roslyn*, 99 AD3d 702 [2012]) while negotiating for or accepting a short sale so as to establish an abuse of process. The evidence in fact established that a mistake occurred, and Aurora decided to unilaterally rescind the contract immediately upon discovering the mistake. That decision may have been imprudent or unwise, but it hardly rises to the level of "immoral, unconscionable conduct . . ." *(National Distillers & Chem. Corp. v Seyopp Corp.*, 17 NY2d 12, 15

[1966]). Lastly, a writing exists signed by the parties charged herein and performed within one year, which thus makes the statute of frauds inapplicable *(see* General Obligations Law § 5-701 [a]*)*. The remaining defenses, however, appear relevant and can be considered in the context of both this case's facts and Aurora's positions concerning those facts.

(3)

Aurora has admitted that multiple mistakes occurred in processing this short sale transaction. However, Aurora disputes the type or character of the mistakes made. First, Aurora claims that mutual mistakes were made between the parties and therefore no "meeting of the minds" occurred concerning the true approved sales price. Aurora, in support of this position, claims that the March 20, 2009 approval letter was a nullity as no contract existed between Ms. Moncayo (Vaccaris's assignor) and Arauz at the time that letter was created and issued. Specifically, the letter "approved" a contract with a sales price of $196,850.00 when the contract defendant Arauz's counsel submitted specified $360,000.00. Additionally, Aurora highlights that it had rejected a prior short sale agreement between Arauz and Moncayo for $325,000.00 six months earlier. Therefore, Aurora posits, Arauz and Vaccaris knew or should have known that the approval letter contained a mistake since it referenced a contract for approximately $130,000.00 less than the previous denial. Superficially, this claim appears meritorious.

Aurora, to prove mutual mistake, however, faces harsh caselaw which warns that "to overcome the heavy presumption that a deliberately prepared and executed written instrument manifested the true intention of the parties, evidence of a very high order is required" (s*ee George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 219 [1978]). Meeting this burden requires a party "show in no uncertain terms, not only that [*6]mistake or fraud exists, but exactly what was really agreed upon between the parties" *(id.* at 219). Such a standard "forbids relief whenever evidence is loose, equivocal or contradictory, or it is in its texture open to doubt or to opposing presumptions" (*Southard v Curley*, 134 NY 148, 151 [1892] [internal quotation marks omitted]).

The proffered facts that Aurora cites concerning what Arauz and Vaccaris knew or should have known when the initial mistake in the March 20 letter occurred clearly do not meet this high standard. The prior denial letter that Aurora issued regarding the $325,000.00 offer stated that the offer failed to meet "the eligibility criteria established by the insurer/investor of the mortgage." Such language is clearly insufficient to notify Arauz that the $325,000 offer was too low, particularly when Aurora could have more specifically denied the $325,000 offer "for insufficient net recovery to investor" or "insufficient sales price." Moreover, Aurora, through its various representatives, may have mistakenly believed the factual existence of the $196,850.00 contract, but it does not appear that this mistaken belief was mutual at the time of the March 20, 2009 offer as evidenced by the attempt of Arauz's counsel to "go over" the offer with an Aurora underwriter.

Several other factors also merit consideration such as 1) the property's drastic decline in value from the June 2007 closing; 2) that Aurora's parent company, Lehman Brothers, filed for Chapter 11 Bankruptcy Liquidation on September 15, 2008, just a month before the October denial; 3) that six months had passed, during which time Fannie Mae went into receivership and instituted its HOPE NOW program, similar to the Treasury Department's Home Affordable Mortgage Program (HAMP) which also started during this period; and 4) that there is no proof that Aurora otherwise notified Arauz and Vaccaris of its inclination to accept the $360,000.00 offer, such as providing a copy of the March 5, 2009 BPO to Arauz's counsel, or separately advising counsel of the "bottom line" needed by the investor, or even a record of a call to Arauz's counsel at or near the time of the mistaken acceptance conveying the correct information. Arauz and Vaccaris, in such circumstances, could have believed that the lower approval offer of $196,850.00 resulted from a change in "the eligibility criteria established by the insurer/investor of the mortgage" after the September 2008 denial, as opposed to a mistake by an Aurora representative.

(4)

Alternatively, Aurora asserts that a unilateral mistake occurred induced by fraud on Arauz's and Vaccaris's part, or known by them at the time, and that they then took unfair advantage of this error. A unilateral mistake can warrant rescission if allowing rescission

would restore the status quo and denying it would result in unjust enrichment *(see Cox v Lehman Bros., Inc.*, 15 AD3d 239, 239 [2005]). However, "[i]n a case of fraud, the parties have reached agreement and, unknown to one party but known to the other *(who has misled the first)*, the subsequent writing does not properly express that agreement" (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986] [emphasis added]). Aurora, though, has failed to set forth any facts it was wrongfully induced into creating the mistaken approval letter (*see e.g., Wachovia Sec. LLC, v Joseph*, 56 AD3d 269, 270 [2008] ["Wachovia also failed to establish a right of recovery . . . caused by fraudulent conduct . . . and that the mistake occurred despite Wachovia's exercise of due diligence"]). Indeed, the facts establish Aurora's multiple failures of ordinary care and due diligence, which preclude Aurora's unilateral mistake claim (*see Sanford Owners Corp. v Daral Props., LLC*, 84 AD3d 1210, 1212 [2011] ["a failure of [*7]ordinary care . . . precludes a cause of action based on unilateral mistake"][FN7]; *see also, Portnoy v Allstate Indem. Co.*, 82 AD3d 1196, 1198 [2011]). Mr. Mennonoh in fact admitted that each of the three letters issued were separate mistakes of his own, as at anytime between March 20, 2009 and the May 27, 2009 closing he could have either checked the BPO on his computer screen or reviewed the actual physical file and would have discovered the mistaken computer entry. "Nor does the sales price alone provide a basis to set aside the sale since it was not so inadequate as to shock the court's conscience" (*see Crossland Mtge. Corp. v Frankel*, 192 AD2d 571, 572 [1993] *lv denied* 82 NY2d 655 [1993]; *see also, Dime Sav. Bank of NY v Zapala*, 255 AD2d 547, 548 [1998] ["the mere inadequacy of price is an insufficient reason to set aside a sale unless the price is so inadequate as to shock the court's conscience"]).

Furthermore, and more importantly, Aurora fails to realize that the approval letter itself constituted a conditional offer. Although it was "based on" the existence of a specified sales contract, it was not "conditioned upon" its actual existence, a subtle but important distinction. The former assumes existent facts (whether real or perceived) at the time the offer is made or contract formed, while the latter relies on anticipated future facts to trigger contractual duties and obligations. If each of these three letters were separate mistakes, as Aurora has conceded, then Arauz's and Vaccaris's act of amending the sales contract price to conform with the second approval letter created the actual facts underpinning Aurora's specified offer of $196,850 before issuance of the third letter.

Arauz's and Vaccaris's performance of the stated conditions at closing, namely tendering payment, created a unilateral contract, separate and apart from the sales contract. Such a unilateral contract is "unenforceable until acted upon by the promisee" (*see Papa v New York Tel. Co.*, 72 NY2d 879, 881 [1988], *rearg denied* 72 NY2d 953 [1988], quoting *I. & I. Holding Corp. v Gainsburg*, 276 NY 427, 433 [1938]; *see also, Corbin on Contracts* § 2.29, p 250 [1993 2nd ed. Perrillo]. Such a unilateral contract became irrevocable upon completing unequivocal performance, and, absent a mutual mistake, reformation or rescission is unavailable to plaintiff (*see Mortimer B. Burnside & Co. v Havener Sec. Corp.*, 25 AD2d 373, 375 [1966]).

(5)

Aurora, therefore, could not rescind this unilateral contract, and several affirmative defenses asserted by Vaccaris become applicable. Particularly, accord and satisfaction, estoppel, failure to state a cause of action for foreclosure and application of the parole evidence rule all appear to bar Aurora from proceeding with this foreclosure action. "An accord and satisfaction, as its name implies, has two components. An accord is an agreement that a stipulated performance will be accepted, in the future, in lieu of an existing claim . . . Execution of the agreement is a satisfaction . . . what is bargained for is the performance, or satisfaction." (*Denburg v Parker Chapin Flattau & Klimpl*, 82 NY2d 375, 383 [1993] [internal citations omitted]). Here, Aurora's approval letter coupled with Vaccaris's payment of the amount the letter requested worked as an accord and satisfaction. Aurora had no ability to revoke or rescind the approval letter in view of Vaccaris's payment, which functioned as the performance or satisfaction in this case. Aurora's foreclosure claim as a [*8]consequence of the accord and satisfaction was extinguished, and Aurora thus fails, pursuant to CPLR 3211 (a) (7), to state a cause of action for foreclosure. "Further, extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face" (*South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278 [2005] [internal quotation marks omitted].

Equitable estoppel applies to the facts of this case, but Vaccaris cannot invoke such a defense. Establishment of an equitable estoppel defense requires a showing that defendant had been "misled into a detrimental change of position" (*Matter of Shondel J. v Mark D.*,

7 NY3d 320, 326 [2006]). Here, no submitted evidence shows that Vaccaris was misled into this transaction, or would not be willing to complete the transaction for a different sales price. However, the title agent, as evidenced by Certified Land Abstract, Inc.'s June 8 and June 11, 2009 letters, could clearly claim equitable estoppel as it would not have issued a title policy, or conducted the closing, if the presented payoff letter did not reconcile with the proceeds produced at the closing table by Vaccaris.

(6)

Movant Vaccaris also asserts nine counterclaims: 1) and 8) negligent and intentional tortuous interference with defendant's property, respectively; 2) a violation of General Obligations [sic] Law § 349 [FN8]; 3) breach of the implied covenant of good faith and fair dealing; 4) and 5) general and vague violations of New York State Law and RESPA, respectively; 6) breach of the payoff statement by conduct; 7) fraudulent misrepresentation; and 9) a counterclaim for "bad faith." The counterclaims for tortuous interference, breach of the payoff statement, for violations of New York State Law and RESPA, respectively, and for "bad faith" are dismissed for failing to make a prima facie case. Particularly, Vaccaris has not proven any actual pecuniary damages suffered from either Aurora's failure to satisfy the mortgages or Aurora having placed a lis pendens on the property.

The counterclaim alleging a violation under GBL § 349 (h) is dismissed for failing to allege the three essential elements of this statutory cause of action (*see Koch v Acker, Merrall & Condit Co.*, 18 NY3d 940, 941 [2012]; *see also, Yellow Book Sales and Distribution Co., Inc. V Hillside Van Lines, Inc.*, 98 AD3d 663, 664-665 [2012] ["To successfully assert a claim under General Business Law §§ 349 or 350, a party must allege that its adversary has engaged in consumer-oriented conduct that is misleading, and that the party suffered injury as a result of the allegedly deceptive act or practice . . . Accordingly, private contractual disputes which are unique to the parties do not fall within the ambit of the statute"]).

The counterclaim for fraudulent misrepresentation is dismissed as the evidence presented failed to establish that the mistaken letters contained factual misrepresentations known to be false by plaintiff at the time of their respective creations (*see Abbate v Abbate*, 82 AD2d 368, 377 [1981]). Lastly, Vaccaris's sole remaining counterclaim — for breach of the implied covenant of good faith and fair dealing — is also dismissed as duplicative of the breach of the payoff letter counterclaim. Both of these counterclaims are

based on the same facts and both seek the same monetary relief (*see Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [2010] *lv denied* 15 NY3d 704 [2010]*; see also, Logan Advisors, LLC v Patriarch Partners*, 63 AD3d 440, 443 [2009]).

(7)

[*9]Vaccaris prematurely requests to vacate the lis pendens. Generally, "there is little a court may do to provide relief [to him as] the property owner" (*5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 320 [1984]. CPLR 6514 (a), allows such relief only if 1) service of the summons has not been accomplished in accordance with CPLR 6512, 2) the action has been settled, discontinued or abated, 3) the time to appeal from a final judgment against plaintiff has expired, or 4) if enforcement of a final judgment against plaintiff has not been stayed pursuant to CPLR 5519. Here, Vaccaris makes no assertion that service was not accomplished in accordance with CPLR 6512, nor has this action been settled, discontinued or abated.[FN9] Further, Aurora's time to appeal from this final judgment has not yet expired nor has it obtained a stay pursuant to CPLR 5519. CPLR 6514 (b) equally does not afford Vaccaris relief, as he has made no showing that Aurora "has not commenced or prosecuted this action in good faith." Vaccaris's request is thus premature and hence denied.

(8)

Lastly, the court declines the invitation by Vaccaris to award sanctions pursuant to 22 NYCRR 130-1.1. Although plaintiff's complaint was not ultimately meritorious, the action cannot be characterized as frivolous, "as it was neither completely without merit in law' or fact nor undertaken primarily to delay or harass (22 NYCRR 130-1.1; *cf. Caplan v. Tofel*, 65 AD3d 1180, 1181 [2009])" (*South Point, Inc. v Redman*, 94 AD3d 1086, 1087 [2012]). Accordingly, it is

ORDERED that the branch of defendant Vaccaris's summary judgment motion to dismiss plaintiff's complaint is granted based upon the first (accord and satisfaction), fourth (failure to state a claim upon which relief can be granted) and eighth (parole evidence rule) affirmative defenses asserted in his answer; and it is further

ORDERED that the complaint is dismissed in its entirety with prejudice; and it is further

ORDERED that the branch of Vaccaris's motion for Aurora to accept his payment and issue satisfactions of the underlying mortgage loans is granted to the extent that upon Vaccaris tendering the sum of $171,964.28 to Aurora, it is directed to consider the debt of defendant Arauz satisfied in full and plaintiff shall then forthwith issue and cause to be recorded in the City Registrar's Office satisfactions of mortgage for loan numbers 0046068219 and 0046068011, covering the property known and located at 1285 Jefferson Avenue, Brooklyn, New York 11221 and corresponding to block 3383 lot 44; and it is further

ORDERED that the branch of Vaccaris's motion for summary judgment on its counterclaims is denied in its entirety, and it is further

ORDERED that the branch of Vaccaris's motion for sanctions, pursuant to 22 NYCRR 130-1.1, in the form of costs and attorneys' fees assessed against Aurora is denied, and it is further

ORDERED that the branch of Vaccaris's motion to vacate the lis pendens that Aurora filed against the property is denied without prejudice as premature and with leave to renew.

This constitutes the decision, order and judgment of the court.

E N T E R, [*10]

J. S. C.

Footnotes

Footnote 1: Principal, Interest, Taxes and Insurance.

Footnote 2: RPAPL § 1304 requires a lender, an assignee or a mortgage loan servicer to send the borrower a notice "at least ninety days before" commencing legal action, in at least fourteen-point type, advising the borrower of available resources and foreclosure alternatives as well as warning against foreclosure rescue predators.

Footnote 3: HOPE NOW is an alliance between the United States government, mortgage lenders and servicers, foreclosure counselors, the Federal Housing Administration (FHA), Fannie Mae and the Federal Home Loan Mortgage Corporation (Freddie Mac). This

alliance, created under President George W. Bush in 2007, sought to stem the rising tide of foreclosures through loan modifications offered by servicers of Fannie Mae and Freddie Mac loans. The initial step under the program is to send borrowers in default or who are very likely to default in the near future an introductory letter requesting current financial information.

Footnote 4: The record is unclear whether Andrew typed these numbers into the letter, or a program called "Fidelity," which generated the letter automatically, included these incorrect figures, or if Andrew "copied and pasted" these numbers from the other short sale acceptance letter.

Footnote 5: Aurora claims in its opposition papers to have never received this amendment. However, Mr. Mennonoh could not deny at his deposition that the copy of the amendment produced came from Aurora's records turned over during discovery.

Footnote 6: However, the letter generated by Aurora is dated May 11, 2009. Additionally, it appears that on May 11, 2009 Aurora sent an allonge (i.e. an assignment) of the promissory note to a "processor" — with an expected update in ten days — in furtherance of its concurrent foreclosure efforts.

Footnote 7: This tort standard, applied to contracts, makes defendant's "contributory negligence" defense — as a complete bar to recovery — also relevant.

Footnote 8: Presumably, defendant intended to allege a violation of General *Business* Law § 349 (h).

Footnote 9: *Cf., Citibank, N.A. v Murillo*, 30 Misc 3d 934 [Sup Ct, Kings Co 2011].

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