United States District Court
Southern District of Texas
ENTERED
March 08, 2021
Nathan Ochsner, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KIMBERLY GATLIN,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. H-20-46
	§	
FEDERAL HOME LOAN	§	
MORTGAGE CORPORATION *and*	§	
PHH MORTGAGE SERVICES,	§	
	§	
Defendants.	§	

FINAL JUDGMENT

Because the Court has granted summary judgment in favor of Defendants Federal Home Loan Mortgage Corporation and PHH Mortgage Services on all pending claims in this lawsuit by Plaintiff Kimberly Gatlin, the Court hereby

ORDERS that Plaintiff Kimberly Gatlin's case is **DISMISSED**.

THIS IS A FINAL JUDGMENT.

SIGNED at Houston, Texas, on this 8 day of March, 2021.

DAVID HITTNER
United States District Judge

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v.	§	Civil Action No. H-20-46
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FEDERAL HOME LOAN MORTGAGE CORPORATION *and* PHH MORTGAGE SERVICES,	§	
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	§	
	§	
Defendants.	§	

ORDER

Pending before the Court are Plaintiff's Motion for Partial Summary Judgment and Brief in Support (Document No. 18) and Defendants' Motion for Summary Judgment (Document No. 23). Having considered the motions, submissions, and applicable law, the Court determines Defendants' motion should be granted and Plaintiff's motion should be denied.

I. BACKGROUND

This is a breach of contract case based on Defendants' alleged failure to originate a home equity loan in compliance with the Texas Constitution. On December 23, 2016, Plaintiff Kimberly Gatlin ("Gatlin") refinanced her homestead located at 1102 Baltic Lane, Houston, Texas 77090 (the "Property") with a home equity loan (the "Loan") in the amount of $160,000 payable to LoanDepot.com, LLC

("Loan Depot").[1] In connection with the Loan, Gatlin executed a promissory note (the "Note"), which required her to make monthly payments of $1,173.50 to Loan Depot. Simultaneously with the execution of the Note, Gatlin executed a deed of trust (the "Deed of Trust"), granting a security interest in the Property to Mortgage Electronic Registration Systems, Inc. ("MERS") as beneficiary. Gatlin also executed other documents related to the Loan, including an acknowledgment regarding fair market value of the Property (the "Acknowledgment"). It is undisputed Loan Depot did not sign the Acknowledgment.[2]

By August 22, 2019, the Federal Home Loan Mortgage Corporation ("Freddie Mac") had become holder of the Note and PHH Mortgage Services ("PHH") had become servicer of the Loan.[3] On August 22, 2019, Gatlin sent notice via certified mail to Freddie Mac and PHH ("Defendants") that Loan Depot had not signed the Acknowledgment. By August 23, 2019, Gatlin had fully paid off the Loan.[4] On August 30, 2019, MERS executed a release of lien on the Property, which was

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[1] *See Plaintiff's Motion for Partial Summary Judgment and Brief in Support*, Document No. 18, Exhibit 1 (*Texas Home Equity Note*).

[2] *Plaintiff's Motion for Partial Summary Judgment and Brief in Support*, Document No. 18, Exhibit 3 at 2 (*Acknowledgment Regarding Fair Market Value of Homestead Property*).

[3] The parties do not make clear on what date Freddie Mac became the holder of the Note and PHH became servicer of the Loan.

[4] The parties do not make clear on what date Gatlin fully paid off the Loan.

subsequently filed with the Official Public Records of Real Property of Harris County.

On November 18, 2019, Gatlin filed this case in the 189th Judicial District Court for Harris County, asserting claims for: (1) violation of the Texas Constitution, art. XVI, § 50(a)(6)(Q)(ix); and (2) breach of contract.[5] On January 7, 2020, Defendants removed the case to this Court on the basis of diversity jurisdiction. On June 5, 2020, Defendants filed an amended answer disputing the validity of Gatlin's claims and asserting a counterclaim in the alternative for equitable subrogation. On December 31, 2020, Gatlin moved for partial summary judgment on her breach of contract claim. On January 29, 2021, Defendants moved for summary judgment.

II. STANDARD OF REVIEW

Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court views the evidence in a light most favorable to the nonmovant. *Coleman v. Hous. Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir. 1997). Initially, the movant must present the basis for the motion and the elements of the causes of action upon which the nonmovant is unable to establish a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then

[5] *Notice of Removal*, Document No. 1 at 1.

shifts to the nonmovant to identify specific facts demonstrating a genuine issue for trial. *See* Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). A dispute of "material fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 956 (5th Cir. 1993) (citation omitted).

But the nonmovant's bare allegations, standing alone, are insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). The nonmovant cannot rest on his allegations to get to a jury without any significant probative evidence tending to support those allegations. *Nat'l Ass'n of Gov't Emps. v. City Pub. Serv. Bd. of San Antonio*, 40 F.3d 698, 713 (5th Cir. 1994). If a reasonable jury could not return a verdict for the nonmovant, then summary judgment is appropriate. *Liberty Lobby, Inc.*, 477 U.S. at 248. It is not the function of the Court to search the record on the nonmovant's behalf. *Topalian v. Ehrman*, 954 F.2d 1125, 1137 n.30 (5th Cir. 1992). Therefore, while the Court views "the evidence and all reasonable inferences drawn therefrom in the light most favorable to the nonmovant, the nonmoving party . . . must respond by setting forth specific facts indicating a genuine issue for trial." *Goodson v. City of Corpus Christi*, 202 F.3d 730, 735 (5th Cir. 2000) (quoting *Rushing v. Kan. City S. R.R. Co.*, 185 F.3d 496, 505 (5th Cir. 1999)).

III. LAW & ANALYSIS

A. Violation of the Texas Constitution

Gatlin contends the Loan violated the Texas Constitution because Loan Depot did not sign the Acknowledgment. Defendants contend that, because the Loan has been paid off and the lien on the Property released, the Court cannot provide a remedy.

The Texas Constitution protects homesteads from forced sales, including in relation to home equity loans. Tex. Const., art. XVI, § 50(a). For a lien on a homestead to be valid pursuant to a home equity loan, the loan must comply with "a litany of exacting terms and conditions" set forth in the Texas Constitution. *See Garofolo v. Ocwen Loan Servicing, L.L.C.*, 497 S.W.3d 474, 477 (Tex. 2016). Section 50(a) of the Texas Constitution ("Section 50(a)") prohibits the forced sale of a homestead unless the underlying loan was "made on the condition that . . . the owner of the homestead and the lender sign a written acknowledgment as to the fair market value of the homestead property on the date the extension of credit is made." Tex. Const., art. XVI, § 50(a)(6)(Q)(ix). "[S]ection 50(a) creates but one [constitutional right]: freedom from forced sale to satisfy debts other than those described in its exceptions." *Garofolo*, 497 S.W.3d at 478. The terms and conditions are not constitutional rights and obligations unto themselves, but "only assume constitutional significance when their absence in a loan's terms is used as a shield

from foreclosure." *Id.*; *Alexander v. Wells Fargo Bank, N.A.*, 867 F.3d 593, 599 (5th Cir. 2017).

It is undisputed Defendants never attempted to foreclose on or force a sale of the Property. Thus, the constitutional right implicated by Section 50(a) was never violated. *See Garofolo*, 497 S.W.3d at 478. Accordingly, Defendants' motion is granted as to the claim the Loan violated the Texas Constitution.

B. Breach of Contract

Gatlin contends Loan Depot violated the terms of the Loan by failing to sign the Acknowledgment and thus Defendants must forfeit the interest and principal paid pursuant to the Note. Defendants contend Gatlin has not shown she was damaged by any breach.

Under Section 50(a), if a home equity lender or the holder of a home equity note "fails to comply with the lender's or holder's obligations under the extension of credit," the lender or holder "shall forfeit all principal and interest of the extension of credit." Tex. Const., art. XVI, § 50(a)(6)(Q)(x). As a prerequisite to forfeiture, the borrower must provide notice of the noncompliance to the lender and the lender must fail to cure the noncompliance within sixty days of the notice. *Id.* When the constitutional forfeiture provision is incorporated into the terms of the loan, the forfeiture remedy is properly pursued through a breach of contract action. *See Garofolo*, 497 S.W.3d at 484. The elements of a claim for breach of contract are: (1)

a valid contract; (2) performance or tender of performance; (3) breach; and (4) damage to the plaintiff as a result of the breach. *Garofolo v. Ocwen Loan Servicing, L.L.C.*, 669 F. App'x 219, 220 (5th Cir. 2016). To succeed on a breach of contract claim premised on failure of a home equity lender to comply with Section 50(a), a plaintiff must either show actual damages or make out a valid claim for liquidated damages. *See id.* Liquidated damages refer to a measure of damages stipulated in a contract in the event of breach. *Id.* (citing *Flores v. Millennium Interests, Inc.*, 185 S.W.3d 427, 431 (Tex. 2005)). For a claim for liquidated damages to be valid, the stipulated damages must be a reasonable estimate of actual damages. *Flores*, 185 S.W.3d at 431.

The constitutional forfeiture provision was incorporated into the Deed of Trust.[6] Gatlin notified Defendants of Loan Depot's failure to sign the Acknowledgment and the Loan's subsequent noncompliance with Section 50(a).[7]

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[6] *Plaintiff's Motion for Partial Summary Judgment and Brief in Support*, Document No. 18, Exhibit 2 at 12 (*Deed of Trust*) ("[A]fter Lender has received . . . notice, has had 60 days to comply, and Lender has failed to comply, . . . all principal and interest [shall] be forfeited by Lender, as required by Section 50(a)(6)(Q)(x), Article XVI of the Texas Constitution in connection with failure by Lender to comply with its obligations under this Extension of Credit.").

[7] *See Plaintiff's Motion for Partial Summary Judgment and Brief in Support*, Document No. 18, Exhibit 4 (*Gatlin's Notice to Freddie Mac Via Certified Mail*); *Plaintiff's Motion for Partial Summary Judgment and Brief in Support*, Document No. 18, Exhibit 5 (*USPS Notice of Delivery of Gatlin's Notice to Freddie Mac*); *Plaintiff's Motion for Partial Summary Judgment and Brief in Support*, Document No. 18, Exhibit 6 (*PHH Acknowledgment of Correspondence*).

Defendants did not cure the Loan's noncompliance within sixty days of receipt of notice.[8] Gatlin had paid off the Loan before the Defendants had received notice of noncompliance. The lien on the property was released eight days after she sent the notice. She does not allege the fair market value stated on the Acknowledgment is wrong. She does not contend the forfeiture provision of the Deed of Trust is a liquidated damages provision and further does not allege the elements necessary for a valid liquidated damages claim. The Court finds Gatlin does not show she sustained damages as a result of the Loan's noncompliance and Defendants' failure to cure and therefore Gatlin cannot establish an essential element of her claim. Accordingly, Defendants' motion is granted as to the breach of contract claim and Gatlin's motion is denied.

IV. CONCLUSION

Accordingly, the Court hereby

[8] Defendants deny the Loan is noncompliant at all because at closing Gatlin signed a document stating Loan Depot had executed the Acknowledgment, and thus Defendants had no obligation to cure. *Defendants' Motion for Summary Judgment*, Document No. 23 at 2. However, Section 50(a) and, by reference, the Deed of Trust, require that "the lender sign a written acknowledgment as to the fair market value of the homestead property . . . ." Tex. Const., art. XVI, § 50(a)(6)(Q)(ix); *Plaintiff's Motion for Partial Summary Judgment and Brief in Support*, Document No. 18, Exhibit 2 at 12 (*Deed of Trust*) ("It is Lender's . . . intention to conform strictly to . . . Section 50(a)(6), Article XVI of the Texas Constitution."). When interpreting the Texas Constitution, courts must rely on the literal text and give effect to its plain language. *Garofolo*, 497 S.W.3d at 477. Accordingly, the Court finds a home equity loan requires a signed acknowledgment as to the fair market value of the homestead to be valid under Section 50(a).

ORDERS that Plaintiff's Motion for Partial Summary Judgment and Brief in Support (Document No. 18) is **DENIED.** The Court further

ORDERS that Defendants' Motion for Summary Judgment (Document No. 23) is **GRANTED**.

The Court will enter a separate final judgment.

SIGNED at Houston, Texas, on this 8 day of March, 2021.

DAVID HITTNER
United States District Judge