SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

WELLS FARGO BANK, N.A.,	
Plaintiff,	**Case No.: 2016 CA 004571 R(RP)**
v.	
MARIAN A. PORTER, *et al.*,	**Judge José M. López**
Defendants.	**Civil Calendar 14**

ORDER

This matter comes before the Court on Plaintiff Wells Fargo Bank, N.A. ("Wells Fargo")'s "Motion for Summary Judgment" ("Motion"), filed on December 31, 2019. Defendants filed a "Response in Opposition to Wells Fargo Bank, N.A.'s Motion for Summary Judgment and Cross-Motion for Partial Summary Judgment as to Count III" ("Opposition") on February 28, 2020, to which Plaintiff filed a "Reply Memorandum in Support of Wells Fargo Bank, N.A.'s Motion for Summary Judgment and Opposition to Defendants' Cross-Motion for Partial Summary Judgment" ("Reply") on April 6, 2020. The Court held a hearing on the motion on November 16, 2020. For the following reasons, the motion for summary judgment is denied and the cross-motion for partial summary judgment is granted.

BACKGROUND

On June 23, 2016, Wells Fargo filed a Complaint for Judicial Foreclosure, seeking to foreclose on the home owned by the Porters. The Porters filed their Initial Answer, Introduction, Affirmative Defenses, and Counterclaims on July 25, 2016. Thereafter, Wells Fargo filed a Motion to Dismiss Counterclaim on August 11, 2016. At a February 3, 2017 hearing, the parties agreed to mediation; the Porters dismissed the initial counterclaim without prejudice as to re-filing should mediation fail, and the Motion to Dismiss was withdrawn.

The parties failed to reach an agreement through mediation and the Porters filed Defendants/Counter-Plaintiffs Marian and Thomas Porter's Counterclaim and Joinder and Demand for Jury Trial ("Counterclaim") on August 3, 2017. The Counterclaim asserted four (4) counts, including violations of the Real Estate Settlement Procedures Act ("RESPA") and the D.C. Consumer Protection Procedures Act ("CPPA"). Counterclaim ¶¶ 45-53.

On December 7, 2017, the Court granted Defendants/Counter-Plaintiff's Motion to Amend their Counterclaim as to Count I. On August 23, 2018, the Court held a hearing on Wells Fargo's Motion to Dismiss, which it granted in part and denied in part. The Court dismissed Count I of the First Amended Complaint and dismissed the Porters' claim for statutory damages in Count II of their Countercomplaint, as well as part of Count III. The remaining claims by the Porters against Wells Fargo were as follows: (1) claims that Wells Fargo violated RESPA and the CPPA in its response to the Porters' denial of their loss mitigation application reviewed during the pendency of this lawsuit (Counts II and IV); and (2) claim that Wells Fargo violated the CPPA in 2007 when it included false information on the Porters' loan application (Count III).

On October 30, 2019, the Court granted in part and denied in part Wells Fargo's Motion for Reconsideration as to Count III. The Court declined to dismiss the CPPA claim with respect to the Porters' claim that Wells Fargo inflated the income stated on the loan application. However, the Court dismissed the claims in Count III where Mrs. Porter alleged Wells Fargo engaged in unlawful trade practices by failing to disclose certain negative aspects of the loan. The Court found that that part of Mrs. Porter's claims was time-barred because of her decision to opt out of a class action settlement agreement in 2010.

On December 13, 2019, Wells Fargo filed the instant motion for summary judgment. Wells Fargo argues that it is entitled to judgment on its claim for judicial foreclosure since there is no dispute that Mrs. Porter defaulted on the loan, that Wells Fargo notified her of the default, and that she failed to cure it. Since there is no valid defense to the claim for judicial foreclosure, Wells

Fargo is entitled to summary judgment. Further, Wells Fargo stated that it is entitled to judgment on the Porters' Counterclaim for violation of RESPA (Count II). There is no genuine issue of material fact that the Denial Letter complied with RESPA, and that even if the letter was deficient, the Porters did not suffer a resulting damage. The Denial Letter's reference to "valid documents" refers to discrepancies with the Porters' loss mitigation application. Specifically, Mrs. Porter's signature was not genuine, and her representation that the property was her primary residence conflicted with other documents showing that she resided in Virginia. Therefore, the term "valid documents" meets RESPA's requirement of providing a basis for the lender's denial. Lastly, Wells Fargo argues that it is entitled to judgment as a matter of law on the Porters' claims for violations of the CPPA in Counts III and IV. There is no genuine dispute that the statute of limitations period to bring a claim under the CPPA is three years. Mrs. Porter executed the loan application in February 15, 2007, so her CPPA claim is time-barred. Additionally, there is no dispute as to Mrs. Porter's signature, and the record shows that she was given the opportunity to review all documents before signing them. The Porters cannot identify a specific prohibited trade practice that Wells Fargo committed, and loss mitigation does not qualify as a "trade practice" under the CPPA. A loan servicer's obligations to review a borrower for loss mitigation is covered under RESPA; therefore, the Court should deny the CPPA claim because reviewing an application is not a trade practice. Lastly, Wells Fargo argues that the Porters cannot show that they suffered any actual damages as a result of the alleged violations of the CPPA. The Porters are unable to show that their inability to stay current on the loan as modified was attributable to Wells Fargo's alleged inflated income on the loan application, rather than Mrs. Porter's income decreasing.

In response, the Porters argue that Wells Fargo is not entitled to summary judgment on the foreclosure claim due to "unclean hands" and the fact that Wells Fargo employed fraud in the inducement of the loan. Specifically, the Porters allege that Wells Fargo failed to disclose all of the terms of the Pick-a-Pay loan prior to closing, processed a forged loan application with false

income information for Mrs. Porter, and approved Mrs. Porter for a loan for which she did not quality. A jury should decide whether the mortgage was valid or fraudulent, and the statute of limitations does not bar the Porters from raising a fraud defense to judicial foreclosure. Next, the Porters claim that Count III is viable and should be heard by a jury because it satisfies all of the required elements of the action, and there are material issues of fact remaining in dispute. Mrs. Porter argues that her claims fall under the statute of limitations period for a CPPA claim because she was only made aware of the fraudulent application in discovery in May 2015. She also contests the validity of her signature on the loan application, and whether she was shown a copy of the loan application at closing. A genuine issue of fact also exists as to whether the Porters acted reasonable in their investigation, and whether they should have discovered the fraud at an earlier date. As for the issue of damages, the Porters state that their damages include potentially losing their home in foreclosure, and Mrs. Porter's stress, nervousness, marital strife, loss of sleep, gastric distress, and fear of losing a home in foreclosure. Lastly, the Porters argue that they should be granted summary judgment on Count II of their Amended Counterclaim because Wells Fargo's denial letter did not comply with RESPA and Regulation X. The Porters were unable to appeal Wells Fargo's decision because they could not explain what Wells Fargo viewed as the discrepancies based on the denial letter provided. The resulting damages were that the Porters incurred attorneys fees and suffered emotional distress.

LEGAL STANDARD

"Summary judgment is a remedy that entitles the moving party to judgment as a matter of law when no genuine issue of material fact is present at the time the motion is made." *See Sturdivant v. Seaboard Serv. Sys., Ltd.*, 459 A.2d 1058, 1059 (D.C. 1983). The purpose of summary judgment is "to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required." *See Ayala-Gerena v. Bristol Myers-Squibb*

Co., 95 F.3d 86, 94 (1st Cir. 1996) (quoting *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 794 (1st Cir. 1992)).[1]

To prevail on a motion for summary judgment, "[t]he moving party must first establish that there is no genuine issue of material fact." *See Landow v. Georgetown-Inland West Corp.*, 454 A.2d 310, 313 (D.C. 1982). A material fact is "one which, under the applicable substantive law, is relevant and may affect the outcome of the case." *See Rajabi v. Potomac Elec. Power Co.*, 650 A.2d 1319, 1321 (D.C. 1994). "Any doubt as to whether or not an issue of fact has been raised is sufficient to preclude a grant of summary judgment." *See McCoy v. Quadrangle Dev. Corp.*, 470 A.2d 1256, 1259 (D.C. 1983).

If the moving party carries its initial burden, "the burden shifts to the non-moving party to show the existence of an issue of material fact." *See Landow*, 454 A.2d at 313. To meet this requirement, the non-moving party must proffer "some significant probative evidence" tending to support his or her contentions "so that a reasonable fact-finder would return a verdict for the non-moving party." *See Brown v. 1301 K. St. Lit. P'ship*, 31 A.3d 902, 908 (D.C. 2011) (quoting *1836 S St. Tenants Ass'n v. Estate of Battle*, 965 A.2d 832, 836 (D.C. 2009)). The non-moving party must do more than rely on conclusory allegations or denials in his or her pleadings and must establish more than a "metaphysical doubt" or a "scintilla of evidence." *See Gilbert v. Miodovnik*, 990 A.2d 983, 988 (D.C. 2010) (quoting *LaPrade v. Rosinsky*, 882 A.2d 192, 196 (D.C. 2005); *accord Boulton v. Inst. Of Int'l Educ.*, 808 A.2d 499, 502 (D.C. 2002). "There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment

[1] *See Cohen v. Owens & Co.*, 464 A.2d 804, 906 n.3 (D.C. 1983) ("Super. Ct. Civ. R. 56, in its entirety, is identical to FED. R. CIV. P. 56 . . . . [W]hen a local rule and a federal rule are the same, we may look to federal court decisions interpreting the federal rule as 'persuasive authority in interpreting [the local rule].'") (quoting *Vale Props. v. Canterbury Tales, Inc.*, 431 A.2d 11, 13 n.3 (D.C. 1981)).

may be granted." *See Barrett v. Covington & Burling, LLP*, 979 A.2d 1239, 1245 (D.C. 2009) (quoting *Brown v. George Washington Univ.*, 802 A.2d 382, 385 (D.C. 2002)).

In considering the merits of the moving party's request, the Court reviews the record in the light most favorable to the non-moving party, "drawing all reasonable inferences from the evidence in the non-moving party's favor." *See Medhin v. Hailu*, 26 A.3d 307, 310 (D.C. 2011). The Court may not "resolve issues of fact or weigh evidence at the summary judgment stage." *See Barrett*, 979 A.2d at 1244 (quoting *Anderson v. Ford Motor Co.*, 682 A.2d 651, 654 (D.C. 1996)). In ruling upon a motion for summary judgment, the Court reviews "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, to determine whether there is a genuine issue as to any material fact." *See District of Columbia v. Gray*, 452 A.2d 962, 964 (D.C. 1982) (internal citations omitted).

ANALYSIS

This case arises from an unfortunate history of certain financial institutions selling predatory loans to customers who did not qualify for them and misrepresenting the key terms of the loans. As a result of these practices, many consumers defaulted on their loans, never really understanding the terms of their agreement. In this case, many material facts in dispute remain as to the circumstances surrounding this specific loan application process and whether Wells Fargo engaged in fraudulent and predatory practices with the Porters. For these reasons, and others explained below, the Court will deny Wells Fargo's motion for summary judgment, and grant the Porters' motion for partial summary judgment.

A. Wells Fargo is not entitled to summary judgment on its claim for judicial foreclosure.

Wells Fargo is not entitled to summary judgment as a matter of law on its claim for judicial foreclosure against the Porters. The record shows that there is a material fact in dispute regarding the validity of the mortgage. A fact-finder must determine whether Wells Fargo fraudulently

induced the Porters into signing the loan, failed to disclose all terms of the loan prior to closing, processed a forged loan application with a false income for Mrs. Porter, and approved Mrs. Porter for a loan for which she did not qualify. The Porters have provided sufficient probative evidence in the record such that a reasonable fact-finder could return a verdict in their favor. *See Brown v. 1301 K. St. Lit. P'ship*, 31 A.3d 902, 908 (D.C. 2011). Mrs. Porter alleges that she relied on the misrepresentations and omissions of Wells Fargo to enter into the loan, and that she was subsequently harmed.

The Court agrees that there is no dispute that Mrs. Porter defaulted on the loan. However, if the mortgage is not valid, then Wells Fargo is not entitled to a judicial foreclosure. Additionally, the Court agrees with the Porters that, as a court of equity, this Court cannot allow a party to benefit from alleged illicit behavior. If the Porters can prove that Wells Fargo has committed fraud, it would be inequitable to grant a foreclosure on the property. The D.C. Court of Appeals has held that the appropriate time to raise a defense of fraud is in the foreclosure proceedings. *See Henderson v. Snider Bros., Inc.,* 439 A.2d 481, 486 (D.C. 1981) (holding that fraud is not a counterclaim that can be raised at any time, but a "defense which is lost if not raised in the foreclosure proceeding."). Accordingly, the statute of limitations does not bar parties such as the Porters from raising a defense of fraud to judicial foreclosure. *King v. Kitchen Magic, Inc.,* 391 A.2d 1184, 1187 (D.C. 1978). Therefore, material issues of fact exist and the Court cannot grant summary judgment on this issue.

B. Wells Fargo is not entitled to judgment on the Porters' claims for violations of the CPPA.

The Court cannot grant summary judgment as to the Porters' claims for violations of the CPPA because the issue of whether the discovery rule exception applies involves material issues of fact that must be determined by a fact-finder. Mrs. Porter argues that Wells Faro engaged in unfair and deceptive trade practices in violation of the DC CPPA when Wells Fargo forged loan

documents to increase her income to $10,000 and to qualify her for a Pick-a-Pay loan when she did not qualify for one. Although Mrs. Porter executed the loan application on February 15, 2007, she claims that she was only made aware of the fraudulent application during discovery for this litigation in May 2015. Therefore, if this timeline is supported at trial, her claim would fall under the discovery rule exception to the statute of limitations. Under the discovery rule, "one must know (or by the exercise of reasonable diligence should know) (1) of the injury, (2) its cause in fact and (3) of some evidence of wrongdoing" in order for a cause of action to accrue. *Bussineau v. President & Directors of College*, 518 A.2d 423, 425 (D.C. 1986). At this juncture, the Court must review the record in the light most favorable to the non-moving party, "drawing all reasonable inferences from the evidence in the non-moving party's favor." *See Medhin v. Hailu*, 26 A.3d 307, 310 (D.C. 2011).

Viewing the record in the light most favorable to Mrs. Porter, the Court can draw a reasonable inference that she only became aware of the fraud in 2015. The Court credits the fact that the Porters had a burden to read documents that they signed at closing. *See Pers Travel, Inc. v. Canal Square Assocs.,* 804 A.2d 1108, 1110-11 (D.C. 2002) (holding that, as a general rule, "one who signs a contract has a duty to read it and is obligated according to its terms."). However, it is unclear based on the record provided if Mrs. Porter could have understood the negative amortization component of the agreement, even if she had read the documents herself. Mrs. Porter thought she was singing a thirty-year fixed rate loan. Further, Mrs. Porter argues that Wells Fargo took active steps to conceal the fraudulent loan application from her, which she claims she saw for the first time during discovery in this litigation. Mrs. Porter also states that she does not remember being shown a copy of the loan application at closing. Therefore, a fact-finder will have to determine not only if they believe Mrs. Porter's reasoning, but also if her actions were reasonable under the circumstances. A genuine issue of material fact exists as to whether the Porters acted

reasonably in their investigation, and whether they could or should have discovered the alleged fraud earlier. The Court will deny summary judgment on this basis.

Wells Fargo argues that the Porters claims of violations under the CPPA cannot withstand summary judgment because the loss mitigation procedures are not trade practices under the CPPA. Wells Fargo cites various federal cases in which courts have declined to hold that credit services fall under Acts like the CPPA. *See* Plf. Mot. at 29-31. Trade practice is a term that is construed liberally to achieve the purpose of the CPPA, which is to protect consumers. *See* D.C. Code § 28-3901(c). Under D.C. Code § 28-3901(a)(6), "trade practice" is defined as "any act which does or would create, alter, repair, furnish, make available, provide information about, or, directly or indirectly, solicit or offer for or effectuate, a sale, lease or transfer, of consumer goods or services." Under the CPPA, unfair trade practices also include misrepresentations of materials facts that have a tendency to mislead, failing to state material facts if such failures tend to mislead, and making or enforcing unconscionable terms or provisions of sales or leases. *See* D.C. Code § 28-304(c), (f), (r).

The Porters argue that their claim falls under the CPPA because Wells Fargo engaged in unfair and deceptive trade practices when it altered or forged a loan application. Following this definition, and the guidance of the D.C. Code to construe the act liberally, the Court finds that this circumstance falls within trade practice as defined in the CPPA. The Court believes the case of *Solomon v. Falcone*, 791 F. Supp. 2d 184 (D.D.C. 2011) is especially persuasive. There, the D.C. District Court held that mortgage transactions are subject to the CPPA, and that Plaintiff sufficiently stated a claim under the CPPA for unconscionability and misrepresentation. *Id.* at 187. There, Plaintiff entered into a similar Pick-a-Pay loan agreement, but her loan was based on inaccurate financial information and she alleged that the actual terms of the loan were never disclosed. *Id.* The Court allowed the suit to proceed, and found that Plaintiff sufficiently plead violations of the CPPA. Following the logic of that case, this Court finds that the alleged

misrepresentations and unconscionability of Wells Fargo in this action fall under "trade practices" as contemplated by the CPPA. To hold otherwise would be to not protect consumers in this context, which would not serve the ultimate purposes of the CPPA.

Lastly, the Court finds that there is probative evidence in the record that the Porters suffered damages which included attorney's fees, increased debt, and the loss of equity in the property. In two years under this loan agreement, Mrs. Porter's principal increased $21,158.25, despite making timely payments, because she did not qualify for the loan. It is clear that the Porters could potentially lose their home in foreclosure if Wells Fargo succeeds in its action. The Court also finds that there is probative evidence that Mrs. Porter has suffered emotional damages such as stress, nervousness, marital strife, loss of sleep, gastric distress, and the fear of losing her home. Therefore, the Court finds that there is sufficient probative evidence of damages on the record to support a CPPA claim.

C. The Porters are entitled to summary judgment because the term "valid documents" is not specific enough to comply with the requirements of RESPA and Regulation X.

The Porters are entitled to summary judgment on their cross-motion for partial summary judgment. The Porters argue that the term "valid documents" used in Wells Fargo's May 1, 2017 Denial Letter was not specific enough to comply with the requirements of the Real Estate Settlement Procedures Act ("RESPA") and 12 U.S.C. § 1024.41 ("Regulation X").

As explained by the Porters in their brief, under RESPA, a denial letter must state the specific reasons for the denial in writing within 30 days of receipt of the complete loss mitigation application. *See* Def. Opp. at 27-29; *Obazee v. Bank of New York Mellon,* 2015 WL 4602971, at *2 (N.D. Tex. Jul. 31, 2015). The purpose of the denial letter is "[t]o assist consumer understanding, and to effectuate the appeal process." Mortgage Servicing Rules, 78 Fed. Reg. at 10830. Under 12 U.S.C. § 1024.41(d), "a servicer shall state in the notice sent to the borrower

pursuant to paragraph (c)(1)(ii) of this section **the specific reason or reasons** for the servicer's determination for each such trial or permanent loan modification option and, if applicable, that the borrower was not evaluated on other criteria." (emphasis added). In its May 1, 2017 letter, Wells Fargo stated that it denied the Porters' loss mitigation application because the Porters "did not provide us with valid documents as requested."

In their motion to dismiss, Wells Fargo reasoned that the Porters were denied because they did not provide Mrs. Porter's W-2 forms. Now, Wells Fargo argues that the term "valid documents" refers to two discrepancies with the Porter's loss mitigation application: 1) that Mrs. Porter's signature on the RMA was not genuine; and 2) that Mrs. Porter's representation that the Property was her primary residence when other financial documents showed she lived primarily in Virginia.

Here, the Court agrees that the term "valid documents" would not reasonably put the Porters on sufficient notice to be able to investigate, inquire about, or appeal Wells Fargo's denial. Regardless of the accuracy of Wells Fargo's allegations, the Porters would not be able to understand or explain what Wells Fargo viewed as the discrepancy based on the language in the denial letter. The failure to provide valid documents as requested could have reasonably meant that Wells Fargo required more documents, or that documents already provided were not valid. Clearly, Wells Fargo was also confused at some point regarding what the denial was based on as well, as evidenced by two completely different reasonings provided to the Court. The Court cannot state that the May 1, 2017 denial letter served its purpose to assist the consumers' understanding or effectuating the appeal process. *See* Mortgage Servicing Rules, 78 Fed. Reg. at 10830. Therefore, the letter does not sufficiently state the reasons for denial such that it could comply with RESPA and Regulation X.

Additionally, the Court finds that there is probative evidence in the record that the damages from Wells Fargo's RESPA violations were that the Porters incurred attorney's fees and emotional

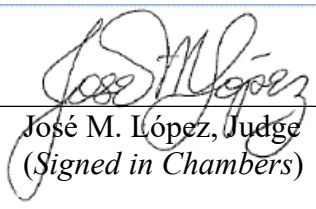
distress. "A servicer that fails to comply with Regulation X is liable for 'any actual damages to the borrower as a result of the failure' to comply." *Robinson v. Nationstar Mortg. LLC,* No. CV TDC-14-3667, 2019 WL 4261696, at *8 (D. Md. Sept. 9, 2019) (citing 12 U.S.C. § 2605(f)(1)(A)). Here, the record clearly shows that the Porters suffered actual damages in attorney's fees and emotional distress. The damages flowed directly from the RESPA violation in the denial letter. In response to receiving the letter, the Porters retained counsel to draft and send two notices of error to attempt to receive clarification on the meaning of invalid documents, and they suffered emotional distress from Wells Fargo attempting to foreclose on their home. The amount of those actual damages must be determined by a fact-finder at trial. At this stage, Plaintiff only need show the existence of damages, rather than an amount. *Beach TV Properties, Inc. v. Solomon,* 306 F. Supp. 3d 70, 96 (D.D.C. 2018). Therefore, the Court will grant partial summary judgment in favor of the Porters on this count and reserve on the issue of the amount of damages until trial.

Accordingly, it is this 12th day of May, 2021 hereby

ORDERED, that Plaintiff Wells Fargo's Motion for Summary Judgment is **DENIED.** It is further

ORDERED, that Defendant Marian Porter's Motion for Partial Summary Judgment as to Count III is **GRANTED.**

SO ORDERED.



José M. López, Judge
(*Signed in Chambers*)

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