


PENTAGON FEDERAL CREDIT UNION,	:	February Term, 2019
successor in interest of	:	Case No. 00199
PROGRESSIVE FEDERAL CREDIT UNION	:	
	:	
<i>Plaintiff</i>	:	
	:	
v.	:	Commerce Program
	:	
KHALIQ HUSSAIN and U & Y CORP.	:	
	:	
<i>Defendants</i>	:	Control No. 21032257

The **STAY OF EXECUTION** is **LIFTED**.

BY THE COURT,



GLAZER, J.

OPINION

Plaintiff (hereinafter “Lender”), filed a complaint against individual defendant Khaliq Hussain (“Borrower”), and corporate defendant U & Y Corp. (“Guarantor”). The complaint asserts a breach-of-contract-claim against Borrower and Guarantor, respectively. The complaint avers that Borrower and Guarantor defaulted on their obligations upon a November 25, 2013 secured balloon note of \$220,000.00 (the “Note”), a corporate “Guaranty,” and a January 20, 2017 Loan Modification Agreement, as they allegedly failed to pay the amounts due at the maturity of the Note.¹ Under the complaint, Lender seeks to recover the following amounts:²

Principal	\$200,044.04
Interest	\$3,730.90
Late fees	\$259.90
Total	\$204,084.84

On July 30, 2019, Borrower and Guarantor filed an answer with new matter and counterclaims to the complaint. In the answer, Borrower and Guarantor generally deny having defaulted on their obligations, but also aver that their “alleged failure to make payments was the direct result of Plaintiff’s conduct.”³ In the new matter, Borrower and Guarantor assert a number of standard defenses, including the averment that Borrower and Guarantor were unrepresented by counsel when they executed the legal documents, and “were unable to read, understand, or ... examine [such] documents” at the time of their execution.⁴ In the counterclaim, Borrower and Guarantor assert against Lender

¹ Complaint, ¶¶ 5-6, 10; Note, Exhibit A to the complaint; Guaranty, Exhibit B to the complaint, Loan Modification Agreement, Exhibit C to the complaint. The Note is secured by collateral in the form of certain assets of Guarantor, including a taxicab Medallion, No. P—972. (*See*, complaint at ¶ 7.)

² Complaint, ¶ 13

³ Answer with new matter and counterclaim, ¶ 10.

⁴ *Id.*, ¶ 43.

the claims of fraud, negligent misrepresentation, and breach-of-contract.⁵ According to Borrower and Guarantor, Lender, in 2007, entered the local taxicab market by financing the acquisitions of that market's most valuable asset –that is, the taxicab medallions; however, Lender's lax and unsound lending practices, including a careless loan-approval process, fueled an artificial rise in the value of all taxicab medallions, and created accordingly an "asset bubble."⁶ Next, Borrower and Guarantor allege in their counterclaims to have been fraudulently induced by Lender to believe that the ever increasing appreciation of their taxicab medallion would allow them to re-finance their debt indefinitely, even after newcomers to the market, including one named "Uber," began to outcompete their traditional taxicab operations by employing a novel business model.⁷ Finally, Borrower and Guarantor explain that the entry of a new type of competition in the taxicab industry caused them to suffer a sharp decline in their business: as a result, their medallion suffered an unexpected collapse in its value, and this collapse destroyed their ability to re-finance the existing debt and to meet their obligations towards Lender.⁸

On October 30, 2019, this Court issued an Order staying execution proceedings and instructing the parties to conduct an accelerated, limited discovery. On March 18, 2021, Lender filed the instant motion for summary judgment which asks the court to grant judgment in its favor, and to dismiss the counterclaims of Borrower and Guarantor. Through this motion, Lender offers the following revised calculation of the amounts sought by Lender, including a new item, attorney's fees, of \$9,974.50:

⁵ *Id.*, at ¶¶ 72-90.

⁶ *Id.*, at ¶¶ 46-51.

⁷ *Id.*, at ¶¶ 53-55, 68-71.

⁸ *Id.*, 52-59.

Principal	\$200,044.04
Interest	\$18,386.18
NSF Fees	\$50.00
Attorney's Fees	9,974.50
Total	\$228,454.72

Borrower and Guarantor filed a response in opposition to Lender's motion for summary judgment on April 14, 2021. The motion and response thereto have been briefed.

DISCUSSION

The standards for summary judgment are well settled:

[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law—

(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or

(2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury....

A proper grant of summary judgment depends upon an evidentiary record that either—

(1) shows the material facts are undisputed or

(2) contains insufficient evidence of facts to make out a prima facie cause of action or defense and, therefore, there is no issue to be submitted to the jury....

Where a motion for summary judgment is based upon insufficient evidence of facts, the adverse party must come

forward with evidence essential to preserve the cause of action.... **If the non-moving party fails to come forward with sufficient evidence to establish or contest a material issue to the case, the moving party is entitled to judgment as a matter of law.** The non-moving party must adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict favorable to the non-moving party. As with all summary judgment cases, the court must examine the record in the light most favorable to the non-moving party and resolve all doubts against the moving party as to the existence of a triable issue.⁹

PLAINTIFF'S BREACH-OF-CONTRACT CLAIMS.

In the motion for summary judgment, Lender asserts that it met its burden of proof as it presented a prima facie case against Borrower and Guarantor. Specifically, Lender asserts that indisputably Borrower promised to repay his debt, failed to meet his repayment obligations, and defaulted under the Note which he had personally executed.¹⁰ Lender also asserts that Guarantor indisputably pledged to satisfy the obligations of Borrower in the event of a default, in accordance with the terms of a duly executed Guaranty.¹¹ Lender concludes that it is entitled to summary judgment on its twin breach-of-contract claims because Borrower and Guarantor have failed to dispute the existence of their obligations and defaults, and have not offered any evidence in support of their new matter defenses and counterclaims.

Under Pennsylvania law, Lender's breach-of-contract claims will succeed if Lender can establish—

- (1) the existence of a contract, including its essential terms;
- (2) a breach of the contract; and,
- (3) resultant damages.¹²

⁹ Grandelli v. Methodist Hosp., 777 A.2d 1138, 1143-44 (Pa. Super. 2001) (emphasis supplied).

¹⁰ Motion for summary judgment, ¶¶ 18, 30-34.

¹¹ Id.

¹² Kelly v. Carman Corp., 229 A.3d 634, 653 (Pa. Super. 2020).

In this case, Lender has shown the existence of three contracts –the Note, Guaranty and Loan Modification– all of which articulate their essential terms, including the obligation undertaken by Borrower and Guarantor to repay certain amounts when due. In addition, Lender has established not only that Borrower and Guarantor breached the agreements by failing to remit the amounts owed, but that it also suffered damages resulting from the breach. Conversely Borrower and Guarantor, the non-moving parties, have failed to come forward with any evidence to contest Lender’s assertions: they have not adduced any evidence of the facts essential to their defense, and have offered no proof in support of their counterclaims. For these reasons, Lender’s motion for summary judgment on its two breach-of-contract claims is granted.

THE COUNTERCLAIMS OF FRAUD AND NEGLIGENT MISREPRESENTATION.

According to Borrower and Guarantor, Lender misled them into believing that they would be able to indefinitely re-finance their debt thanks to the ever-rising value of their taxicab medallion.¹³ They also aver that they acted in reliance of such fraudulent representation.¹⁴

The claim of fraud contains the following elements:

- (1) a representation;
- (2) which is material to the transaction at hand;
- (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false;
- (4) with the intent of misleading another into relying on it;
- (5) justifiable reliance on the misrepresentation; and,
- (6) the resulting injury was proximately caused by the reliance.¹⁵

¹³ Answer with new matter and counterclaims, ¶¶ 72-78.

¹⁴ *Id.*, ¶ 77.

¹⁵ *Gibbs v. Ernst*, 647 A.2d 882, 889 (Pa. 1994).

In this case, Borrower and Guarantor have failed to name the individual who allegedly gave them the assurance that they could re-finance their debt indefinitely due the ever-rising value of their medallion; in fact, they have failed to offer any evidence necessary to satisfy any of the six elements necessary to prove fraud, and for this reason that counterclaim is dismissed.¹⁶ For the same reasons, Borrower and Guarantor may not maintain their second counterclaim, negligent misrepresentation which requires proof of—

- (1) a misrepresentation of a material fact;
- (2) made under circumstances in which the misrepresenter ought to have known its falsity;
- (3) with an intent to induce another to act on it; and
- (4) which results in injury to a party acting in justifiable reliance on the misrepresentation.

The elements of negligent misrepresentation differ from intentional ... [fraud] in that the misrepresentation must concern a material fact and the speaker need not know his or her words are untrue, but must have failed to make a reasonable investigation of the truth of these words.¹⁷

In this case, Borrower and Guarantor have not only failed to offer evidence in support of the four elements necessary to sustain negligent misrepresentation, but have also failed to specifically show that Lender made the alleged negligent misrepresentations without conducting a reasonable and necessary investigation of the truth of its words.

At this stage, the court feels obliged to address a separate-but-related issue to the Borrower's counterclaims of fraud and negligent misrepresentation. In the

¹⁶ Lender's motion for summary judgment is also granted as to the second counterclaim of Borrower and Guarantor, that is, the counterclaim of negligent misrepresentation, and that counterclaim is likewise stricken.

¹⁷Milliken v. Jacono, 60 A.3d 133, 141 (Pa. Super. 2012), aff'd, 628 Pa. 62, 103 A.3d 806 (2014), as modified on reconsideration (Nov. 12, 2014).

memorandum-of-law opposing Lender's motion for summary judgment, Borrower additionally asserts that he, an immigrant with limited knowledge of the English language, was not represented by counsel when he executed the Note, could "hardly be considered a sophisticated businessperson" when he took and subsequently re-negotiated a \$220,000.00 loan, and was "required to state that he [had] consulted with the advice of legal counsel ... even though ... this was not true and he had no comprehension of what the agreement actually said."¹⁸ Stated differently, Borrower asserts that he did not knowingly, voluntarily and intelligently waive his due process rights when he entered into the afore-mentioned agreements. This explanation is rejected: "[i]n the absence of proof of fraud, failure to read the contract is an unavailing excuse or defense and cannot justify an avoidance, modification or nullification of the contract or any provision thereof."¹⁹

In this case, Borrower has offered no evidence that he was coerced or tricked into signing the afore-mentioned agreements without comprehending the nature of his obligations therein. For these reasons, the counterclaims asserting fraud and negligent misrepresentation are dismissed.

THE COUNTERCLAIM OF BREACH-OF-CONTRACT.

The third counterclaim of Borrower and Guarantor asserts that Lender breached the implied covenant of good faith and fair dealing by its unsound lending practices and by—

allowing payments on the basis of an anticipated write-down
and then, in bad faith, reversing course shortly before filing
suit for the full amounts ... [and by] lulling ... [Borrower and

¹⁸ Memorandum in opposition to Lender's motion for summary judgment at p. 4 (un-numbered).

¹⁹ Standard Venetian Blind Co. v. Am. Empire Ins. Co., 469 A.2d 563, 566 (Pa. 1983).

Guarantor] into a false sense of security that ... [Lender] would continue to refinance the loans and allow them to keep their Medallions; and by contributing to the downfall of its own collateral.²⁰

Under Pennsylvania law, a “breach of the covenant of good faith [and fair dealing] is nothing more than a breach of contract claim.”²¹ Stated another way, a “breach of the implied covenant of good faith and fair dealing is subsumed in a breach of contract claim.”²² In addition, “to recover for damages pursuant to a breach of contract the [counterclaim] plaintiff must show a causal connection between the breach and the loss.”²³

In this case, Borrower and Guarantor have offered no evidence whatsoever –no evidence that Lender suddenly and in bad faith reversed its course of dealing, no evidence that Lender lulled Borrower and Guarantor into the unrealistic belief that the value of their taxicab medallions would increase indefinitely, and no evidence that Lender’s words and conduct contributed to the downfall of their collateral. For this reason, the third and last counterclaim based on breach of the implied covenant of good faith and fair dealing is likewise dismissed.

THE ATTORNEY’S FEES CLAIMED BY LENDER.

In the complaint, Lender claimed no attorney’s fees whatsoever, whereas in its motion for summary judgment, it seek such fees in the amount of \$9,974.50. The court understands that this case required protracted litigation and intense motion practice, and Lender may contractually collect “reasonable attorney’s fees” under ¶ 8 of the Note. Under these circumstances, however, the court is compelled to exercise its equitable

²⁰ Answer to the complaint with new matter and counterclaims, at ¶ 88.

²¹ JHE, Inc. v. SE Pennsylvania Trans. Auth., (Pa. Com. Pl. May 17, 2001).

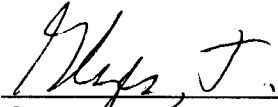
²² Title Agency, Inc. v. Evaluation Servs. Inc., 951 A.2d 384, 391 (Pa. Super. 2008).

²³ Logan v. Mirror Printing Co. of Altoona, 600 A.2d 225, 226 (Pa. Super.1991).

powers and to mold the amount of attorney's fees, particularly in light of the upheavals endured by the taxicab industry, and the ruin suffered by many of its operators:

"[a]lthough an agreement ... [may] provide for the breaching party to pay the attorney fees of the prevailing party in a breach of contract case ... the trial court may consider whether the fees claimed to have been incurred are reasonable, and to reduce ... [them] if appropriate."²⁴ Accordingly, the claimed attorney's fees are reduced to \$4,987.25.

BY THE COURT,



GLAZER, J.

²⁴ McMullen v. Kutz, 985 A.2d 769, 776–77 (Pa. 2009).