IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION—CIVIL

PENTAGON FEDERAL CREDIT UNION, successor in interest of PROGRESSIVE FEDERAL CREDIT UNION	:	December Term, 2019 Case No. 00146
Plaintiff	:	
v.	:	Commerce Program
WASEEM KHOKHAR and **KHOKHAR TAXICAB CO.**	:	
Defendants	:	Control No. 21033624

ORDER

AND NOW, this 25th day of August, 2021, upon consideration of the motion for summary judgment of plaintiff, the response in opposition of defendants, the respective *memoranda*-of-law, and the evidence on the record, it is **ORDERED** that the motion is **GRANTED** and judgment is entered in favor of plaintiff and against defendants.

The counterclaims of defendants asserting fraud, negligent misrepresentation and breach-of-contract or breach of the implied covenant of good faith and fair dealing, are **DISMISSED**.

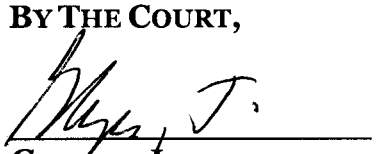
The judgment amount in favor of plaintiff is entered as follows:[1]

[1] The court understands that this action required protracted litigation and motion practice, and Lender may contractually collect "reasonable attorney's fees" under ¶ 8 of the Note and ¶ 22 of the Forbearance Agreement. Under these circumstances, however, the court is also compelled to exercise its equitable 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

Subtotal from Notes A and B	$1,056,043.94
Deferred Interest	$39,035.58
Attorney's Fees	$6,172.70
Total	$1,101,252.22

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

BY THE COURT,



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to reduce ... [them] if appropriate." (See, McMullen v. Kutz, 985 A.2d 769, 776–77 (Pa. 2009). Accordingly, the amount of attorney's fees is reduced from $12,345.40 to $6,172.70.

OPINION

Plaintiff is an entity named Pentagon Federal Credit Union ("Lender"); defendants are an individual, Waseem Khokhar ("Borrower"), and his taxicab company, Khokhar Taxicab Co. ("Guarantor").

Lender's predecessor-in-interest loaned $1,050,000.00 to Borrower, and Borrower promised to repay this debt under the terms a promissory note (the "Original Note"), dated November 7, 2013.[2] On the same day, Guarantor guaranteed the obligations of Borrower under the terms of an "Original Guaranty."[3] Subsequently, Borrower and Guarantor defaulted on their obligations under the Original Note and Original Guaranty.

On February 17, 2017, Borrower and Guarantor entered into a "Forbearance Agreement" with Lender's predecessor-in-interest.[4] Under this agreement, Lender's predecessor-in-interest agreed to forgo its rights under the Original Note and Original Guaranty, whereas in return Borrower and Guarantor acknowledged their default, and promised to repay those original obligations pursuant to the terms of two new promissory notes (hereinafter, "Note A" and "Note B"), attached to the Forbearance Agreement.[5] On March 15, 2017, Guarantor agreed to guarantee the renewed obligations of Borrower under the terms of a "Forbearance Guaranty."[6] Subsequently, Borrower and Guarantor defaulted upon their renewed obligations, and Lender commenced the instant civil action on December 2, 2019.

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[2] First Note, Exhibit A to the complaint.
[3] First Guaranty, Exhibit B to the complaint.
[4] Forbearance Agreement, Exhibit C to the complaint.
[5] Note A, Note B, at id.
[6] Forbearance Guaranty, Exhibit D to the complaint.

In the complaint, Lender asserts two claims of breach-of-contract against Borrower and Guarantor, respectively, for their failure "to make payments when due," in the amount of $1,073,715.80, pursuant to Note A and Note B of the Forbearance Agreement.[7]

On December 27, 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."[8] 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.[9] Lastly, Borrower and Guarantor assert against Lender the counterclaims of fraud, negligent misrepresentation, and breach-of-contract.[10] According to these counterclaims, Lender, in 2007, entered the local taxicab market by financing the acquisitions of that market's most valuable asset, namely, the taxicab medallions; however, Lender's lax and unsound lending practices, including a careless loan-approval process, fueled a rise in the value of all taxicab medallions which caused an "asset bubble."[11] Next, Borrower and Guarantor allege 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

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[7] Complaint, ¶¶ 13, 17-21, 22-25.
[8] Answer, ¶ 13.
[9] New matter, ¶ 43.
[10] Counterclaims, ¶¶ 72-90.
[11] Id., ¶¶ 46-52.

traditional taxicab operations by employing a novel business model.[12] Borrower and Guarantor explain that the entry of a novel form 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 value, and this collapse destroyed their ability to re-finance the existing debt and to meet their obligations.[13] Finally, according to Borrower and Guarantor, Lender represented that the loan obtained by Borrower would be reclassified into two portions: one portion would reflect the then current market value of the taxicab medallions, and the other portion would be written-off as uncollectable.[14] In short, Borrower and Guarantor aver that Lender's alleged unsound practices and fraudulent representations lulled them into the—

> false sense of security that they could keep their medallions, even though ... [Lender] intended all along to seek to collect the full amounts of the loan once it had destroyed the taxicab medallion market.[15]

On January 2, 2020, 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. 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:

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[12] Id., at ¶¶ 53-57, 68-71.
[13] Id., 52-59
[14] Id., at ¶¶ 59-61
[15] Id., at ¶ 69

> [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.[16]

PLAINTIFF'S BREACH-OF-CONTRACT CLAIMS.

In the motion for summary judgment, Lender asserts that it met its burden of proof by presenting a prima facie case against Borrower and Guarantor. Specifically,

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

Lender asserts that indisputably Borrower promised to repay his debt, failed to meet his repayment obligations, and defaulted under the Original Note and subsequently under the Forbearance Agreement and its new Notes, A and B.[17] Lender also asserts that Guarantor indisputably defaulted under the Original Guaranty, and subsequently under the Forbearance Agreement with its underlying Forbearance Guaranty.[18] Lender concludes that it is entitled to summary judgment on its twin breach-of-contract claims because Borrower and Guarantor cannot dispute the existence of their obligations and defaults, and have not offered any evidence in support of their new matter defenses.

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.[19]

In this case, Lender has shown the existence of several contracts, including the Original Note, the Original Guaranty, the Forbearance Agreement with its attached new Notes, A and B, and the Forbearance Guaranty. 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 that Borrower was prevented from obtaining legal counsel when he signed the Note, Guaranty and Loan Modification

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[17] Motion for summary judgment, ¶¶ 11, 15, 19.
[18] Id., ¶¶ 13, 16, 19.
[19] Kelly v. Carman Corp., 229 A.3d 634, 653 (Pa. Super. 2020).

Agreement, on behalf of himself and Guarantor. 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 collateral –that is, their three taxicab medallions.[20] They also aver that they relied on such fraudulent representations.[21]

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.[22]

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

> negligent misrepresentation 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

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[20] Answer with new matter and counterclaims, ¶¶ 72-78.
[21] Id., ¶ 77.
[22] Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994).

(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.[23]

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 *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 substantial 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."[24] 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

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[23]Milliken 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).

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

unavailing excuse or defense and cannot justify an avoidance, modification or nullification of the contract or any provision thereof.[25]

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 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.[26]

Under Pennsylvania law, a "breach of the covenant of good faith [and fair dealing] is nothing more than a breach of contract claim."[27] Stated another way, a "breach of the implied covenant of good faith and fair dealing is subsumed in a breach of contract claim."[28] In addition, "to recover for damages pursuant to a breach of contract the [counterclaiming] plaintiff must show a causal connection between the breach and the loss."[29]

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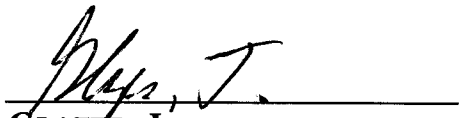
[25] Standard Venetian Blind Co. v. Am. Empire Ins. Co., 469 A.2d 563, 566 (Pa. 1983).
[26] Answer to the complaint with new matter and counterclaims, at ¶ 88.
[27] JHE, Inc. v. SE Pennsylvania Trans. Auth., (Pa. Com. Pl. May 17, 2001).
[28] Title Agency, Inc. v. Evaluation Servs. Inc., 951 A.2d 384, 391 (Pa. Super. 2008).
[29] Logan v. Mirror Printing Co. of Altoona, 600 A.2d 225, 226 (Pa. Super.1991).

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 expectation that the taxicab medallions would increase in value indefinitely, and no evidence that Lender's words and conduct may somehow have a causal connection to the unexpected convulsions endured by the taxicab industry in recent years. For this reason, the third and last counterclaim based on breach of the implied covenant of good faith and fair dealing is likewise dismissed.

BY THE COURT,



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