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US NATIONAL BANK ASSOCIATION, *Plaintiff* v. OSCAR MONTESDEOCA, ET AL. *Defendants.*	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION BERGEN COUNTY DOCKET No. BER-F-24093-12 CIVIL ACTION OPINION **TRIAL DECISION**

Trial: November 18 and 19, 2013
Additional Submissions: November 25, 2013
Decided: December 4, 2013

Honorable Peter E. Doyne, A.J.S.C.

Barbara K. Hager, Esq. on behalf of the Plaintiff, US Bank National Association (Reed Smith, LLP).

Michael A. Cassata, Esq. and Joseph A. Chang, Esq. on behalf of the Defendant, Oscar Montesdeoca (Joseph A. Chang & Associates, LLC).

Introduction

A trial was conducted to decide whether the plaintiff, US Bank National Association ("US Bank" or "plaintiff"), is entitled to its requested relief. The evidence in the record and the testimony elicited suffice to demonstrate the answer must be in the negative. Plaintiff's contention is a stark one: Defendant, Oscar Montesdeoca, Sr. ("Montesdeoca" or "defendant"),

knew the terms of the loan he was receiving as of the date of closing; therefore, the consequences of accepting the loan fall solely on his shoulders. Such a broad contention simply cannot be accepted.

Rather, it is apparent defendant was offered a loan by plaintiff which he could not conceivably afford. Defendant and his family exemplify the ideals which underlie the basic tenets of opportunity so valued in this country. Together, defendant and his family struggled to make payments on a loan which inevitably must have, and did, end in default.

In this court's experience of handling foreclosure matters for approximately ten years, this is the first time someone has concretely demonstrated a case of predatory lending. The court is wary of tenuous assertions of fraudulent lending practices and generic refrains suggesting "banks are evil". Such is not the case here. The loan transaction from which this litigation arises is an exemplar of predatory lending.[1]

Facts and Procedural Posture

A. The note and the mortgage

On August 3, 2006, defendant executed and delivered an adjustable rate note (the "Note" or the "loan" or the "primary loan") in the amount of $486,160 to Wells Fargo Bank, N.A. ("Wells Fargo"). The Note obligated defendant to make monthly payments in the amount of at least $3,357.79 at the initial interest rate of 7.375% a year. The maturity date was scheduled for September 1, 2036, at which time all unpaid principal and interest thereon would have become due. The note provided for a late charge of 5.000% on the payment due for any payment not received within fifteen (15) calendar days from that payment's due date. The note also provided that if the borrower defaulted by failing to pay a monthly payment in full, the lender may require immediate payment in full of the principal balance remaining due and all accrued interest.

[1] This court's prior written decision dated September 27, 2013 is incorporated herewith as if set forth at length.

Defendant also received a second loan (the "secondary loan") from Option One Mortgage Corporation ("Option One" or the "secondary mortgagee") though a copy of such has not been provided. However, a disclosure document (the "Option One disclosure") reflecting the secondary loan is appended as plaintiff's Exhibit 46 and provides a loan amount of $121,540 with an interest rate of 14.700% and monthly payments of $1,507.69. Defendant asserts he was unaware until closing he would be receiving a second loan which he was told was to be utilized to make the required down payment.

The court notes, prior to the closing, an email dated July 5, 2006 from Donald F. Mellay ("Mellay"), a branch manager of Wells Fargo, proposed the terms of the primary and secondary loans, respectively, as $486,160 at 7.750% and $121,540 at 14.350%. The note corresponding to the primary loan corroborates the loan amount but provides a 7.375% interest rate. The court also notes defendant's pre-trial memorandum asserts the secondary loan was for $125,000 at 14.750%. As a copy of the secondary loan has unfortunately not been provided, for the purpose of this opinion, the terms contained in the Option One disclosure shall be deemed to constitute the terms of the secondary loan.

To secure payment, defendant executed, simultaneously with the note, a purchase money mortgage (the "mortgage") on defendant's property located at 200 East Church Street, Bergenfield, NJ 07621 (the "property" or the "house"). The mortgage was recorded on October 26, 2006 in the Office of the Clerk of Bergen County, Book 16345, Page 477. Thereafter, the loan was modified pursuant to a Modification Agreement (the "Modification") effective October 13, 2009. The Modification reduced the interest rate of the primary loan to 5.000%.

In October 2011, defendant defaulted. The note and mortgage were subsequently assigned to plaintiff as trustee for Citigroup Mortgage Loan Trust ("Citigroup") on January 11,

2012, which assignment (the "Assignment") was recorded on January 26, 2012 in the Office of the Clerk of Bergen County, Book 941, Page 575.

B. Pleadings

On October 22, 2012, plaintiff filed a complaint against defendant for foreclosure. Defendant's answer was filed on February 7, 2013 setting forth various affirmative defenses and asserting counterclaims. Trial occurred on November 18 and 19, 2013. Additional submissions from plaintiff and defendant were received on November 25, 2013.

Law

The court hereby refers to the law section of its earlier decision at pages 4-11 as the law on foreclosure. Specifically, subsections A, C and D of that opinion are hereby incorporated as if set forth at length. For the purpose of this opinion, the law concerning the Consumer Fraud Act is provided below.

A. New Jersey Consumer Fraud Act

Under The New Jersey Consumer Fraud Act ("CFA"),

> [t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.
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> [N.J.S.A. § 56:8-2]

The purpose of the CFA is to protect consumers by eliminating sharp practices and dealings in the marketing of merchandise and real estate. Perez v. Rent-A-Center, Inc., 186 N.J.

188, 219 (2006). Under the CFA, a claimant need not prove intent to commit an unconscionable commercial practice. Wozniak v. Penella, 373 N.J. Super. 445, 456 (App. Div. 2004).

"[T]o state a claim under the CFA, a plaintiff must allege each of three elements: (1) unlawful conduct by the defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss." New Jersey Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 12-13 (App. Div. 2003).

A party who successfully asserts a violation of the CFA can obtain treble damages pursuant to N.J.S.A. § 56:8-19.

> Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action or assert a counterclaim therefor in any court of competent jurisdiction. In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award *threefold the damages sustained by any person in interest*. In all actions under this section, including those brought by the Attorney General, the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit.
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> [Ibid. (emphasis added)]

An ascertainable loss is one where there is "a cognizable and calculable claim of loss due to the alleged CFA violation." Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 249 (2005). "The remedial purposes of the CFA are not advanced by foregoing the statute's added starter—that of requiring demonstration of a loss that is capable of being determined with certainty—the ascertainable loss prerequisite to a private cause of action." Id. at 251. In Cox v. Sears Roebuck & Co., 138 N.J. 2, 22 (1994), the Court explained that, "traditionally, to demonstrate loss, a victim must simply supply an estimate of damages, calculated within a

reasonable degree of certainty. The victim is not required to actually spend the money…before becoming entitled to press a claim." Ibid.

Analysis

During trial, the crucial issue emerged to be which party supplied information indicating defendant earned $10,150 a month prior to the creation of the loan, as stated on the loan application appended as plaintiff's Exhibit 10. Plaintiff's capable counsel conceded if defendant did not supply the monthly income as set forth in the mortgage application and only made less than $30,000 a year, plaintiff could not prevail. As the court finds that is what occurred, plaintiff cannot proceed to foreclose. Accordingly, that which need be considered in depth are defendant's counterclaims and the remedy to be afforded defendant for prevailing regarding the same. The court will also address plaintiff's status as a bona fide purchaser for value.[2]

A. Fraud

Defendant's pre-trial memorandum asserts defenses and counterclaims which generally assail plaintiff's behavior both in creating this loan and in obfuscating defendant's attempt to refinance. Specifically, defendant asserts plaintiff's behavior violated the CFA. Defendant also asserts unclean hands and violations of the covenant of good faith and fair dealing and the Fair Foreclosure Act. To better understand the factual premise for these assertions, the following background regarding defendant is helpful.

a. Defendant Seeks a House

[2]Although defendant's counsel offered extensive arguments in his pre-trial brief concerning plaintiff's purported lack of standing, the court will assume standing for the purpose of this opinion. While the court assumes plaintiff's standing, it is worth recognizing defendant's counsel's arguments regarding the Pooling and Service Agreement (the "PSA"). Although not argued at trial, defendant's counsel submitted a pre-trial brief which emphasized plaintiff's failure to comply with the procedural requirements of the PSA. Related questions which arise from defendant's argument include defendant's standing to raise this challenge to the PSA and whether defendant is a third-party beneficiary to the PSA. The court withholds judgment as to these issues.

Defendant, born in Ecuador in 1950, arrived in the United States in or around September 2002 with his wife and four adult sons. Together, the family lived in an apartment in a two-family house owned by defendant's brother.

Defendant's brother sold defendant a flower business. Defendant's eldest son, Oscar Montesdeoca, Jr. ("Junior"), testified after taking over the business defendant learned of outstanding bills which needed to be paid by the business. Within a year, the flower business collapsed though defendant continued to import and sell flowers. Defendant then assumed a position with a cleaning company earning $600 a week. In addition to this income, defendant asserts he earned approximately $5,000 annually by importing and selling flowers.[3] Defendant later took a position as a driver earning $500 a week while his wife worked in a pharmacy earning $7.00 an hour.

As a result of the failure of the flower business, defendant's relationship with his brother grew, understandably, tense. This tension was exacerbated as defendant's brother was also his landlord. Accordingly, defendant sought to purchase a home for his family. Defendant wanted to find a home with at least three bedrooms as he intended his children to reside there as well. Through Maria Castro ("Castro"), a broker, defendant and Junior were directed to a number of houses before deciding to purchase the property. As defendant could not afford the purchase price, he sought a loan.

b. Defendant Seeks Loan

Castro arranged for defendant to meet with Mellay. During this meeting—the only meeting defendant ever had with Wells Fargo—Junior "translated" the conversation into Spanish as defendant was and is not fluent in English. Defendant asserts Mellay assured him a loan

[3] The court notes defendant's assertion he earned approximately $5,000 a year importing flowers is not reflected in his 2005 tax return.

would be made available. Moreover, defendant asserts Mellay explained to him Wells Fargo would finance the down payment. Defendant testified he brought bank statements for the two months to Mellay for Wells Fargo to consider prior to obtaining the loan. In addition, defendant testified he brought checks made to cash by his employer as well as his 2005 tax return (the "tax return") indicating his adjusted gross income to be $2,261. (Def. Ex. 1). Defendant was preapproved for a $607,700 loan though, apparently to defendant's surprise, he received two loans.[4] The court notes, however, an email dated July 5, 2006 from Mellay to Junior contains Mellay's explanation defendant can choose either a single-loan or a double-loan option. (Pl. Ex. 14). Whether defendant was informed of these options is unclear though this email casts some doubt over defendant's assertion he was surprised to receive two loans at the closing.

Defendant asserts it was explained to him by Mellay the second loan was in place of a down payment. The interest rates for the two loans were at variance with the primary loan from Wells Fargo subject to a 7.375% rate and the secondary loan from Option One subject to a 14.700% rate. Defendant asserts Mellay said the rates "were only temporary".

Throughout his and Junior's communications with Mellay, defendant asserts he was assured if he timely paid the loan for two years Wells Fargo would refinance the loan at a lower interest rate. Junior testified Mellay promised unequivocally if defendant timely paid the loan and maintained good credit he would receive refinancing.

At the closing on August 3, 2006, defendant asserts he was presented mortgage documents all of which were in English. Defendant could not read them and he had not been provided copies prior to the closing which could have been translated. Present at the closing was

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[4] A Real Estate Contract corresponding to defendant's purchase of the property denotes a purchase price of $607,700. (Pl. Ex. 18). This accords with the principal amounts for the primary and secondary loans, $486,160 and $121,540, which together total $607,700.

Frederic C. Goetz, Esq. ("Goetz"), a lawyer defendant had never met before who did not speak Spanish.

Goetz testified he did between five (5) and twenty-five (25) closings a month in or about 2006 which reduces to approximately one (1) to six (6) closings each working day. He further testified he does not recall this loan. However, Goetz testified he estimated the closing would have taken about an hour. This may or may not be true. The court has no qualm finding Goetz at least presented the loan documents to defendant explaining what they were. However, defendant testified he was merely told to "sign, sign, sign" documents at the closing. The court finds that is what happened. Goetz received the loan package on the day of the closing and reviewed the documents in a cursory fashion with the defendant. The full nature and extent of Goetz's review is uncertain.

Only upon reviewing a copy of the loan application with his present counsel did defendant come to learn his income had been listed as $10,150 a month, more than four times greater than defendant's stated income for 2005, and fifty times greater than the income as stated on his tax return. Defendant denies filling out the application and denies providing any such information, much less having earned a monthly income even close to $10,150. This court so finds, unequivocally. What the court finds is Mellay used the contract of purchase to establish defendant's income to allow the loan to close. It was <u>not</u> based on information received from the defendant.

c. <u>Defendant Pays the Loan for Two Years</u>

Defendant asserts, operating on the belief after two years the interest rates and payments would decrease, he successfully made the mortgage payments during those first two years. Making timely and complete payments during those two years entailed struggle and sacrifice for

defendant and his family. His sons had to drop out of college because their tuition could no longer be afforded. Junior took a $6,000 loan at 20% interest so he could lend defendant money. Additionally, defendant borrowed from credit cards in order to make payments. Suffice it to say, defendant and his family struggled together mightily to satisfy the monthly payments.

d. Defendant Seeks Refinance

After 18 months, defendant asserts Junior communicated with Mellay requesting the promised refinance. On April 2, 2008, Junior wrote an email to Mellay explaining defendant's "need to refinance". (Pl. Ex. 15). Junior urged consideration of the family's dire circumstances as they struggled to make timely payments expending nearly all their resources to so do. Mellay said he would inquire into the matter but never responded. Mellay testified refinancing in 2008 for a 2006 loan would be difficult as home values had decreased. Moreover, there was increased scrutiny on lenders and new debt-to-income requirements.

Junior testified he submitted modification packages to Wells Fargo more than ten times. The packages included an application, a letter of financial hardship, bills and other materials. He would do this regularly. However, Junior testified he would submit the package to one person and someone else would then take over the case. Junior testified when he was called by a representative of Wells Fargo, he would be told to resubmit materials.

Similarly, defendant testified he would call representatives of Wells Fargo frequently complaining of their failure to refinance. The representatives would tell him to submit paperwork which defendant testifies he did. Defendant testifies he submitted everything that was asked for yet representatives were not attendant to his request. Frequently, a different person from Wells Fargo would take over his case.

Eventually, defendant was told by one representative, though he does not recall who it was, if he paid his loan timely he would not get a modification. He was told modifications are only given to people who cannot make payment. Defendant testified he was told not to make payment which he did for three months. When defendant communicated with Wells Fargo afterward, he was told he could not obtain a loan modification because he was falling behind on his payment. Defendant found this to be a confusing process and when he wanted to make payment for the three months he withheld, defendant was told he would not be allowed to as New Jersey law prohibited such action. Defendant testified he was told he would receive a payment plan which he never received. Defendant's recitation of the history of his transaction with Wells Fargo is not controverted and is found to be accurate.

On February 25, 2009, defendant authored an email to Wells Fargo wherein he described his worsening financial circumstances. (Pl. Ex. 19). Accordingly, defendant requested Wells Fargo lower his interest rate and loan amount. At the time defendant requested refinancing, the value of the house would likely have diminished and defendant requested the property be reassessed.

e. <u>Plaintiff Violated the CFA</u>

The forgoing information provides a foundation for defendant's claim plaintiff violated the CFA and committed actionable fraud. Specifically, defendant asserts plaintiff violated the CFA in misrepresenting defendant could refinance the loan after two years. Moreover, in falsifying defendant's income, defendant asserts the loan was secured without regard to defendant's ability to repay. Lastly, he asserts he never requested nor knew the secondary loan, with its high interest rate, would be utilized to provide the required down payment and to pay

exorbitant closing fees.[5] Accordingly, defendant invokes the stigma of predatory lending ascribing insidiousness to plaintiff's behavior.

It is a legal question whether plaintiff had an obligation to refinance, though clearly such a claim is problematic. What is clear is defendant understood Mellay's assurances to constitute a promise. Moreover, defendant materially relied on that promise. Most significantly of all, but for the promise, defendant would not have accepted the loan.

B. Mellay's Testimony

During trial, Mellay testified regarding the primary loan. He concededly and understandably had no recollection of this loan. Mellay testified generally about Wells Fargo's lending practices in 2006. Specifically, Mellay testified Wells Fargo had a "reduced documentation program". Although the loan application describes a "stated income loan", Mellay testified this was a "reduced document loan". Unlike a stated income loan, a reduced document loan considers the previous twelve (12) month bank statements of the borrower including deposits and excluding a profit and loss statement or expenses. The sum of those amounts is divided by twelve to yield a monthly income. Inferentially, as Mellay does not recall this loan, he testified defendant must have provided bank statements and other information which sufficed to deduce he earned $10,150 a month. However, no evidence of these bank statements has been supplied. Mellay testified pursuant to internal policy of Wells Fargo he destroyed his file containing loan documents after a loan was closed. He did testify a copy of the loan documents was sent to the underwriting department of Wells Fargo to approve to the loan. It is troubling no production of these bank statements has been made. This will be discussed more fully later in addressing the issue of spoliation.

[5] At trial, defendant's counsel conceded the closing fees were not exorbitant but were a surprise to defendant.

Although Mellay testified defendant must have supplied information demonstrating a monthly income of $10,150, he conceded he has no recollection of this loan. Moreover, he does not recall either defendant or his son. Additionally, Mellay does not speak Spanish. Mellay's assertion defendant provided information his income was $10,150 a month is categorically rejected.

Mellay testified loan applicants were typically offered a choice to proceed with a reduced documentation program or a full documentation program. It is unclear defendant was ever given such a choice, though it is of no moment as this loan was generated premised upon reduced documentation. Pursuant to the reduced documentation program, Mellay testified he received twelve months of bank statements. Any other materials he received would be submitted to the underwriting department. Mellay further testified he presided over a team of nine employees and personally handled between thirty (30) and fifty (50) loan closings a month. The court also notes Mellay's testimony he earned a commission for his work. In addition, he earned an override based on the performance of his team.

C. Bona Fide Purchaser

Plaintiff's pre-trial memorandum asserts "[a]ssignees are not liable under the CFA for alleged misrepresentations that occurred prior to the assignee taking title." (Pl. Mem. at 7). In support of this position, plaintiff's counsel references O'Loughlin v. Nat'l Cmty. Bank, 338 N.J. Super. 592 (App. Div. 2001). However, O'Loughlin does not provide support for plaintiff's assertion; moreover, it is inapposite to the facts here presented.

In O'Loughlin, the bank was a mortgage lender to a developer of condominiums. The plaintiffs in O'Loughlin sought recovery resulting from alleged problems with the developer's units. The bank later accepted a deed from the developer rather than foreclose and thereby

resolve the developer's default. Thereafter, the bank was made a party to a suit by plaintiffs resulting from the alleged problems affecting certain condominium units. Plaintiffs asserted many claims including a violation of the CFA. The Appellate Division held "the Bank was simply a mortgage lender at the time the construction of the building was completed and the individual plaintiffs occupied their respective units." Id. at 605. In so holding, the Appellate Division recognized the bank's lack of control, either direct or indirect, over the developer at the time when the plaintiffs occupied their units. Most pertinently, the Appellate Division held "the record does not reveal nor does plaintiffs' brief set forth any specific conduct in violation of the Consumer Fraud Act on the part of the Bank associated with plaintiffs' individual units, occurring subsequent to the time the Bank obtained title." Id. at 606.

It is clear the facts of O'Loughlin significantly differ from those before the court. Montesdeoca does assert specific acts of plaintiff's predecessor in violation of the CFA; namely, providing a knowingly inflated income to secure the loan, falsely promising to refinance and, later, interfering with defendant's attempt to obtain refinancing. It can hardly be said a bank exerts no direct or indirect control over the conduct of its lending representative in creating a loan.

Moreover, "collecting or enforcing a loan, whether by the lender or its assignee, constitutes the "subsequent performance" of a loan, an activity falling within the coverage of the CFA." Gonzalez v. Wilshire Credit Corp., 207 N.J. 557, 577-578 (2011); see also N.J.S.A. § 56:8-2.

Defendant's counsel correctly argues "[a]s a general rule, the assignee of a mortgage is subject to any claims and defenses the borrower could have asserted against the original contracting party." (citing N.J.S.A. § 46:9-9).

> All mortgages on real estate in this State, and all covenants and stipulations therein contained, shall be assignable at law by writing, whether sealed or not, and any such assignment shall pass and convey the estate of the assignor in the mortgaged premises, and the assignee may sue thereon in his own name, but, *in any such action by the assignee, there shall be allowed all just set-offs and other defenses against the assignor that would have been allowed in any action brought by the assignor and existing before notice of such assignment.*
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> [N.J.S.A. § 46:9-9 (emphasis added)]

Where the underlying note is a negotiable instrument, it is governed by Article III of the Uniform Commercial Code ("UCC"). See generally N.J.S.A. §§ 12A:3-101-605. Under N.J.S.A § 12A:3-302(a)(2), one who possesses a negotiable instrument may qualify as a holder in due course if the note was acquired

> for value, in good faith, without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, [and] without notice that the instrument contains an unauthorized signature or has been altered . . .

The facts demonstrate plaintiff, as assignee of the underlying debt instrument, is subject to any claims and defenses defendant may assert. Plaintiff has not established facts demonstrating it to be a holder in due course. Accordingly, the actions of plaintiff's predecessor in creating the loan are attributable to plaintiff.

D. Spoliation

As the source of the $10,150 monthly income on the loan application is crucial, it is all the more disappointing no documentary or other evidence has been presented demonstrating how that figure was derived or by whom. The absence of relevant evidence prompts an inquiry concerning the issue of spoliation.[6]

[6] The court notes defendant did not specifically raise the issue of spoliation.

Spoliation "is an act that spoils, impairs or taints the value or usefulness of a thing." Rosenblit v. Zimmerman, 166 N.J. 391, 400 (2001). Typically, spoliation "refers to the destruction or concealment of evidence by one party to impede the ability of another party to litigate a case." Jerista v. Murray, 185 N.J. 175, 201 (2005).

When a finding of spoliation is made against a party, courts can pursue various remedies to redress the harm done. One such remedy is the "adverse inference" or the "spoliation inference" which permits an inference "the evidence the spoliator destroyed or otherwise concealed would have been unfavorable to him or her." Rosenblit, supra, at 401-402. The purpose of this inference is to "even the playing field".

There are four elements which must be demonstrated in order for the inference to be invoked.

> First, it is essential that the evidence in question be within the party's control. Second, it must appear that there has been actual suppression or withholding of the evidence. Third, the evidence destroyed or withheld was relevant to claims or defenses. And fourth, it was reasonably foreseeable that the evidence would later be discoverable.
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> [MOSAID Techs. Inc. v. Samsung Elecs. Co., 348 F. Supp. 2d 332, 336 (2004) (internal citations removed)]

As plaintiff seeks affirmative relief, it has the burden of demonstrating its right to foreclose. In light of the significance evidence demonstrating defendant's monthly income might bear in this matter, the court considers whether an adverse inference should made.

Defendant's counsel argues the four elements required to permit such an inference are present. Regarding plaintiff's control of the evidence in question, there is no doubt Wells Fargo maintained such control over relevant bank documents. This control is attributable to plaintiff as assignee.

Concerning the second element, Mellay testified internal policy required he destroy his copy of defendant's loan file. While it is unclear whether this policy extended to the underwriting department, it is certain plaintiff has not provided these bank documents. It does, therefore, appear the evidence has been suppressed or withheld.[7]

The third element is readily satisfied as these documents are likely to be the only evidence pertinent to the issue of defendant's monthly income which, as has been made clear, is the crux of this opinion. As defendant's counsel argues, Mellay testified, despite no specific recollection of this loan, he generally required twelve months of bank records before proceeding with a loan. Whether these records exist is clearly relevant to plaintiff's claims and Montesdeoca's defenses.

Lastly, pursuant to the fourth element, it was reasonably foreseeable the evidence would later be discoverable. Defendant's counsel argues "the financial crisis and the numerous and well-publicized foreclosure lawsuits occurring over the last ten years" suggests the evidence would be discoverable. (Def. Post-Trial Summation at 6). Moreover, defendant's counsel argues "records such as those at issue here must be retained for a period of ten years." (Def. Post-Trial Summation at 7).[8] Additionally, defendant's counsel refers to N.J.S.A. § 17:16W-3 which provides time periods for the retention of certain "statement accounts". Subsection (a)(2) holds records pertaining to an account opening "shall be retained for as long as the account is open, plus not less than six years after the closing of the account." Ibid. Subsection (a)(3) holds records pertaining to an account closing "shall be retained for not less than six years after the closing of the account." Ibid. As defendant's loan account remains open, documents contained therein should still be retained.

[7] Parenthetically, as defendant's income was crucial to the disposition of the issues presented, it is unclear why the records were not subpoenaed after destruction.
[8] The court notes defendant's counsel does not cite any statute or rule establishing such a ten year period.

Moreover, pursuant to N.J.S.A. § 17:16W-5, "[r]ecords of approval of loans or credit shall be retained for not less than six years after the closing of the loan or credit files." N.J.S.A. § 17:16W-5(a)(3). To the extent defendant provides statutory authority requiring retention of records for six years, the court finds certain loan documents should have been retained until at least August 2012 which would have been six years from the closing date. Given default occurred prior to August 2012, defendant's counsel argues it was foreseeable these documents would be relevant. The relevance of these documents is unquestionably foreseeable since plaintiff initiated this foreclosure action in October 2012.

Plaintiff's counsel argues "the only factor that contributed or led to Plaintiff no longer possessing the financial documents is the passage of time." (Pl. Post-Trial Mem. at 14). Plaintiff's counsel addresses the spoliation issue most vehemently in arguing defendant's "inexcusable delay" in asserting any challenge to the loan. Accordingly, plaintiff's counsel argues this delay "directly led to Plaintiff no longer having possession of the financial documents." (Pl. Post-Trial Mem. at 14). The court finds no delay on defendant's part. Moreover, even if there was delay, it is unclear how this led to plaintiff no longer having possession of these documents. Mellay testified the documents were destroyed, by policy, after the loan closing.

By concession of counsel, these documents have been either destroyed or lost. This is a significant and unfortunate reality as these documents are highly pertinent. The court finds defendant has satisfactorily proven spoliation. Accordingly, the court finds the information contained in these documents would prove to be deleterious to plaintiff's position. Further, even without such an inference, this court finds defendant only supplied two months of bank

statements, although defendant also supplied the tax return and checks made to the order of cash from his employer.

E. Remedy

As the court finds plaintiff is not entitled to foreclose and defendant has prevailed on his counterclaims, it remains to be determined what remedies defendant should be awarded. Clearly, it would be inappropriate to forgive the entirety of the loan. However, in light of plaintiff's behavior in creating this unconscionable loan, defendant is forgiven for any deficiency due upon the loan.

There is uncertainty regarding the relationship between Wells Fargo and Option One. It is unclear what authority this court can exercise over a secondary mortgagee which is a named party but which has not been joined, and, perhaps, the relationship between plaintiff/Wells Fargo and Option One is purposefully obscure. Whether Option One falls under the umbrella of Wells Fargo is unknown. What is known is defendant made no application directly to Option One and had no direct involvement with the secondary lender. Despite these concerns, there must be a recognition of the discrepant interest rates attendant upon both loans. The 14.700% interest rate on the loan offered by the secondary mortgagee is inherently more risky. Accordingly, that rate is reduced to 8.000% from the date of closing. The court acknowledges Option One is not a party, and, accordingly, any remedy Option One seeks shall be solely against plaintiff.

In exercise of this court's equitable authority, the primary and secondary loans are hereby reformed with the interest rates to be set at 5.000% and 8.000%, respectively, from the date of closing, and they cannot be increased for one (1) year. Moreover, defendant is credited with having paid the loan from the time of default to the date of the executed order as a measure of his damages.

As defendant brought a counterclaim pursuant to the CFA, he is awarded treble damages for any ascertainable loss. However, such can only be afforded upon a showing of monetary damage which has not been concretely established. Defendant's counsel's post-trial summation proposes various calculations whereby defendant's ascertainable loss is measured.

First, "damages may be measured by the amount of the improper lien against real property [defendant] now owned." (Def. Post-Trial Summation at 13). Here, the improper lien was in the amount of $486,160. Defendant made payments on the loan but "[p]laintiff still maintains a lien against the property in the amount of $475,256.37 far in excess of the monies it advanced less those it received." (Def. Post-Trial Summation at 14).

Second, "damages may be measured by the out-of-pocket losses [defendant] suffered in the form of payments he made on the loan and monies he borrowed from elsewhere to pay the loan and on closing costs." (Def. Post-Trial Summation at 13). Defendant's out-of-pocket damages, "proven to a reasonable degree of certainty at trial include closing costs, payments of principal, interest and ancillary costs, such as [Junior's] loan, are $209,547.50". (Def. Post-Trial Summation at 14). In addition, defendant's counsel asserts an additional $53,149.65 in damages consisting of "escrow payments for taxes and insurance". (Def. Post-Trial Summation at 14). In total, pursuant to this second measurement, defendant's ascertainable loss is $262,697.15.

The third method suggested by defendant's counsel to calculate damages measures "the increased housing costs [defendant] suffered when he relied on [Mellay's] misrepresentations" concerning defendant's qualification for the loan and promised refinancing. (Def. Post-Trial Summation at 13). These "reliance damages" indicate had defendant continued renting an apartment at $1,200 a month, "he would have paid approximately $105,600 in rent." (Def. Post-Trial Summation at 15). Instead, give defendant's out-of-pocket expenses calculated above as

$262,697.15, defendant's counsel asserts defendant "paid $135,317.48 more than he would have if he continued to live in his affordable rental." (Def. Post-Trial Summation at 15). The figure of $135,317.48 does not include additional payments on the second loan and closing costs.

The court further notes, as an additional consideration regarding the determination of damages, the primary loan was modified reducing the interest rate from 7.375% to 5.000%. As the modification is from October 2009, that indicates defendant's payments from the time of closing until the time of the modification were excessive. Although more thorough calculations appear later in this opinion, it is useful here to consider 7.375% of $486,160 is $35,854.30 which, divided by 12, yields a monthly interest payment of $2,987.85. However, 5.000% of $486,160 is $24,308 which, divided by 12, yields a monthly interest payment of $2,025.66. The difference between defendant's interest payments prior to the modification and after the modification is $962.19 a month which reflects the difference between $2,987.85 and $2,025.66. Accordingly, the $962.19 excess, multiplied by defendant's payments prior to the modification, yields an amount reflecting damage suffered by defendant. Accepting defendant made payments for 18 months, it appears defendant overpaid $17,319.42 ($962.19 x 18).

Clearly, for the purpose of the CFA, the court is satisfied defendant has demonstrated ascertainable loss. Regardless of the accuracy of the above calculation, it need not be done with precision as whatever is the amount overpaid is waived as a penalty for violation of the CFA. Though the award of treble damages is mandatory, defendant failed to prove by competent evidence the exact quantum of his ascertainable loss. Therefore, the remedy shall be to waive the monies due. Whatever the amount is shall constitute defendant's remedy.

The court hereby orders the reformation of defendant's loans to reflect a thirty (30) year amortized loan as of the date of the executed order. The first payment shall be due 30 days after

the executed order. Plaintiff is to provide appropriate computations to defendant and his counsel forthwith.

The New Jersey Supreme Court in D'Agostino v. Maldonado, 2013 N.J. LEXIS 953, (Oct. 3, 2013) reversed the Appellate Division's determination that "because the trial court voided the parties' transaction and restored plaintiffs' title to the Property, plaintiffs sustained no ascertainable loss, and therefore were not entitled to relief under the CFA." Id. at 30-31. Rather, the Supreme Court held "a plaintiff's loss of money or property may constitute the requisite "ascertainable loss"—entitling the plaintiff to collect damages—and the "damages sustained" for purposes of [the CFA], which are to be trebled." Id. at 36. The Supreme Court further held "[a] court adjudicating a CFA claim determines whether the plaintiff has suffered an ascertainable loss, focusing on the plaintiff's economic position resulting from the defendant's consumer fraud—not his or her circumstances after a judicial remedy has been imposed." Id. at 38-39.

Pursuant to the holding in D'Agostino, any ascertainable loss sustained by defendant can be redressed through an award of both equitable and treble damages. Restoring defendant to the position he would have been in had Wells Fargo not violated the CFA does not preclude an award of treble damages as well.

Furthermore, pursuant to the CFA, defendant is awarded counsel fees and costs to the date of the executed order. Pursuant to N.J.S.A. § 56:8-2.11, "[a]ny person violating the provisions of the within act shall be liable for a refund of all moneys acquired by means of any practice declared herein to be unlawful." Accordingly, any payment toward late fees, costs and legal fees of plaintiff are also credited to defendant. Any balance due and owing concerning the loans is waived.

Defendant also seeks credits for the amount defendant would have paid had a suitable loan been offered. Additionally, defendant seeks injunctive relief prohibiting the filing of any foreclosure action or foreclosure related notices against defendant for a period of eighteen months. Lastly, defendant seeks relief requiring plaintiff to take all necessary action to remove the loans at issue from defendant's credit history.

Defendant successfully paid the loan at the initial interest rate of 7.375% from October 2006 until obtaining a modification in October 13, 2009 which reduced the rate to 5.000%. As the initial interest rate on the loan was excessive, defendant is hereby credited any overage paid for the first three years of the loan. However, from the date of the modification until default in October 2011, defendant paid the loan pursuant to the reduced interest rate. Accordingly, defendant is not entitled to any credit for those payments. The secondary loan shall be treated in a similar manner, though utilizing 8.000% as the reformed rate on this loan from 2006 to date.

Payment on the reformed loans will begin anew under the reduced interest rates as set forth above.

Conclusion

The court is tasked with discerning the events which transpired in 2006 leading to the creation of the loan. The paucity of documentary evidence demonstrating defendant's income augments the difficulty of this task. Accordingly, the court must make findings of fact based on an unfortunately limited record, which such record was necessitated by plaintiff's conduct.

Plaintiff's counsel initially offered a stark proposition which essentially invokes the axiom "caveat emptor". According to plaintiff, defendant knew what he was receiving as of the date of closing. Therefore, the consequences fall solely on his shoulders. Irrespective of any misrepresentations contained in the loan, so long as defendant signed and accepted the loan,

plaintiff should be absolved of any wrongdoing in association with the loan. The court rejects this position. Moreover, plaintiff's counsel conceded at trial a lender in 2006 was responsible for reviewing and determining whether a borrower can repay a loan.[9]

Plaintiff's counsel makes the valid argument a lending institution can expect a borrower to have a modicum of responsibility when accepting a loan. This is an unoffending proposition but inapposite in this case. Defendant was an unsophisticated but sincere borrower seeking to purchase a three-bedroom house for his family. His focus was on finding a home and not on the mechanics of obtaining a loan or securing appropriate interest rates. The court notes defendant is college-educated having earned two post-graduate degrees. Plaintiff's counsel elicited this information but did not further the issue to suggest the significance of defendant's educational background. To the extent this information might suggest defendant is more savvy than his testimony might otherwise convey, it is worth noting. However, the gravamen of the evidence compels a finding defendant was an unsophisticated party to this loan. More importantly, Wells Fargo knew the monthly payment could not be made, particularly as it created the false information concerning the borrower's monthly income.

The crux of this matter is once the court finds, as it does, defendant did not represent to plaintiff he made $10,150 a month and Wells Fargo improperly created and utilized this figure, plaintiff's entitlement to relief is precluded.

Although defendant may well have understood prior to closing the terms of the loan, that does not absolve Wells Fargo's behavior. Defendant accepted the loan believing he was promised a refinance and desirous of purchasing a home for his family. Defendant testified "we had already committed ourselves to this loan, we had to comply with the payments no matter

[9] The court notes plaintiff's counsel in her post-trial memorandum reiterated the position lenders in 2006 were not required to ensure a borrower could afford to repay a loan in certain circumstances.

what." Defendant expressed his earnest belief he needed to satisfy the monthly payments pursuant to the loan, regardless of his ability to pay. This was borne out by evidence demonstrating his satisfaction of these payments for two years given the inordinate sacrifice of his family.

While the court finds defendant sincerely complied with the terms of the loan for as long as he could afford to do so and has demonstrated himself to be the victim of predatory lending, it must be acknowledged there are certain troubling facets of this case concerning defendant's candor. There is reason to believe defendant was less than forthright in disclosing his income to the IRS. Defendant did not make $2,261 a year as he testified he was making $500 a week which would amount to approximately $25,000 a year.[10] Clearly, there are viable questions as to how much defendant earned for which there is no conclusive answer.

Plaintiff's counsel argued defendant concealed unreported income. However, whatever misrepresentations defendant may or may not have made, he clearly was not making $10,150 a month, nor did he ever so state. It is to the court, beyond peradventure, defendant never said he earned $10,150 a month. Junior testified he never heard defendant tell Mellay he earned $10,150 a month. According to the loan application, defendant's annual income would have been $121,800. It strains plausibility to believe he concealed more than $100,000 of income.

Plaintiff's counsel argued there must have been some evidentiary and factual basis for the determination defendant was earning $10,150 a month. The more credible explanation, though, and the finding of this court is, Wells Fargo falsely imputed income to defendant in order to ensure these loans could be created. These loans were "reverse-engineered" by the lender who knew there was a contract of sale for the purchase of a house which defendant could not afford.

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[10] Junior testified he believed his dad was earning more than $500 a month premised upon papers he had seen, though it is unclear to what papers he is referring. It is possible he misunderstood defendant's tax return to indicate a monthly income of $2,261 rather than a gross income.

Moreover, the lender knew defendant could not put any money down. To create a loan document that would satisfy the purchase price, the loan originator imputed the requisite income defendant would have needed to earn in order for the underwriting department of Wells Fargo to approve the loan.

Plaintiff's counsel conceded plaintiff was obligated to ensure defendant's ability to repay. In this case, plaintiff did not merely fail to so consider defendant's ability to repay the loan. Rather, it is clear this loan was manufactured after plaintiff learned the purchase price of the house. Plaintiff did not simply fail to inquire as to defendant's income; plaintiff worked backwards to conjure a monthly income which would be commensurate with the projected loan. This is unequivocally an unconscionable commercial practice—the kind appropriately redressed by application of the CFA.

As a result of the overzealous effort of Wells Fargo in creating a loan for defendant, defendant became the victim of financial overreaching. Was defendant promised a refinance? Probably, but not necessarily enforceably so.[11] What is not in question is defendant was given assurances if he timely paid the loans, plaintiff would assist him in two years by means of a reduction in interest rates. Defendant materially relied on this promise and, consequently, struggled alongside his family to satisfy the payment on the loan.

It is unclear how defendant's monthly payment on the primary loan was determined to be $3,357.79 as 7.375% of $486,160 is $35,854.30 which, divided into twelve months, yields $2,987.85. Whatever the precise rubric whereby these calculations are determined, the court is satisfied default was inevitable.

[11] Interest rates for the promised refinance were never discussed making such an enforceable promise problematic, if not unenforceable.

To better understand the particularly egregious nature of the loan transaction, the following calculations are illuminating. Under the terms of the primary and secondary loans as they are, the following equations yield an approximation of defendant's monthly payment.[12]

(Primary Loan) 7.375% of $486,160 is $35,854.30 which, divided by 12 = $2,987.85/month
(Secondary Loan) 14.700% of $121,540 is $17,866.38 which, divided by 12 = $1,488.86/month
Total Payment = $4,476.71/month

However, the following calculations based on a 5% and 8% rate for the primary and secondary loans, respectively, demonstrate the reduced monthly payment still exceeds defendant's gross income.

(Primary Loan) 5% of $486,160 is $24,308 which, divided by 12 = $2,025.66/month
(Secondary Loan) 8% of $121,540 is $9,723.20 which, divided by 12 = $810.26/month
Total Payment = $2,835.92/month

Acknowledging the imprecise nature of determining defendant's monthly payment, there is no question the loan was improperly created. Under no circumstance, given defendant's financial history, could he have made repayment on the loan, even if afforded the lower interest rates of 5% and 8%.

It was and must have been clear in 2006 defendant could not afford this loan. Defendant and his family pooled their efforts to pay and did pay an exorbitant amount. Plaintiff does not deny receiving defendant's income tax return. Pivotally and crucially, in the three over-sized binders submitted by the parties, the twelve monthly bank statements are not provided. In fact, the court finds plaintiff was never given such statements. There is no compelling evidence demonstrating a legitimate basis upon which to offer defendant the loan.

If plaintiff's behavior is not unconscionable, what is? Whatever it means for a lending institution to engage in predatory lending, that is precisely what occurred here. Defendant was

[12] Of course, the same only addresses interest payments, not the reduction of principal or payments of insurance or property taxes.

burdened with a monthly loan payment four times in excess of his trial stated gross income. Under any scenario, this loan must default. This is with a supportive family struggling together to satisfy the loan. Defendant's sons dropped out of college in order to help make payment. Junior borrowed a $6,000 loan with a 20% interest rate in order to contribute to the family's burden. The effort defendant and his family exercised in ensuring payment for 18 months and maintaining good credit was beyond commendable. In immigrating to this country, seeking to purchase a home for his family and working as a family unit to ensure they can afford the home, defendant has attempted what the court considers the "American Dream".

Plaintiff's requested relief is denied; Defendant's counterclaims are granted.

Accordingly, defendant is awarded the aforestated damages; Defendant's request for injunctive relief is denied.

Defendant's counsel shall prepare and submit an order in conformity with this decision.