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Designated by Order of the Court for the publication of court and other legal notices, the Franklin County Legal Journal (USPS 378-950), 100 Lincoln Way East, Chambersburg, Franklin County, PA 17201–2291, contains reports of cases decided by the various divisions of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District of Pennsylvania and selected cases from other counties.

Wells Fargo Bank, N.A., Plaintiff vs. Shirley A. Norris, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Fulton County Branch, Civil Action - Law No. 318 of 2008-C

HEADNOTES

Civil Law- Breach of Contract/Mortgage Foreclosure

Civil Law; Summary Judgment-Generally

1. The purpose of summary judgment is to dispose of cases where a party fails to state a claim or defense after relevant discovery, even though the party's pleadings may state a valid cause of action or defense. Miller v. Sacred Heart Hosp., 753 A.2d 829, 833 (Pa. Super. Ct. 2000); Amiable v. Auto Kleen Car Wash, 376 A.2d 247, 250 (Pa. Super. Ct. 1977).

2. After the close of relevant pleadings, as long as trial is not unreasonably delayed, a party may move for full or partial summary judgment. PA. R. CIV. P. 1035.2.

Civil Law; Summary Judgment- Burden of Proof

1. A party who bears the burden of proof at trial can succeed in obtaining summary judgment if "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." PA. R. CIV. P. 1035.2(1).

2. A party who does not have the burden of proof of trial may be successful in seeking summary judgment "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." PA. R. CIV. P. 1035.2(2).

3. In analyzing the appropriateness of summary judgment, the Court must view the record in the light most-favorable to the non-moving party. Manzetti v. Mercy Hosp. of Pittsburgh, 776 A.2d 938, 945 (Pa. 2001).

4. A party seeking summary judgment is not able to rely merely on the pleadings themselves but must also identify one or more issues of material fact (1) arising from evidence in the record controverting the evidence cited in support of the motion; (2) by challenging the credibility of the witness or witnesses testifying in favor of the motion; or (3) identifying record evidence essential to the claim or defense that the motion avers was not produced. PA. R. CIV. P. 1035.3(a); see Phaff v. Gerner, 303 A.2d 826, 829 (Pa. 1975); Accu-Weather, Inc. v. Prospect Commc'ns, Inc., 644 A.2d 1251, 1254 (Pa. Super. Ct. 1994).

5. A party may not obtain summary judgment if the motion for summary judgment is based solely on its own witnesses' testimony. Pa. R.C.P. 1035.3(a) (citing Nanty-Glo v. Am. Sur. Co., 163 A. 523 (Pa. 1932)); Porterfield v. Trs. Of Hosp. of Univ. of Pa. 657 A.2d 1293, 1294-95 (Pa. Super. Ct. 1995).

Civil Law- Summary Judgment and Discovery

1. Where discovery would not lead to the establishment of a material fact, the Court may enter summary judgment prior to the completion of discovery. Pappas v. UNUM Life Ins. Co. of Am., 856 A.2d 183, 186 (Pa. Super. Ct. 2004) (quoting Gatling v. Eaton Corp., 807 A.2d 283, 286 (Pa. Super. Ct. 2002)).

2. A party seeking discovery (and opposing summary judgment) where significant time has elapsed is obligated to show that the discovery sought is material to their case and that they

acted with due diligence to extend the time for discovery. Reeves v. Middletown Athletic Ass'n, 866 A.2d 1115, 1124 (Pa. Super. Ct. 2004).

3. In order to prevent the entry of summary judgment, a party cannot rely on mere bald statements that additional discovery is needed; a party must make a meaningful argument regarding the importance of the discovery sought. Reeves v. Middletown Athletic Ass'n, 866 A.2d 1115, 1124 (Pa. Super. Ct. 2004).

Civil Law- Breach of Contract- Elements and Damages

1. In Pennsylvania, the elements of a breach of contract are (1) a contract's existence, (2) breach of a duty imposed by the contract, and (3) breach-related damages. Sewer Auth. of City of Scranton v. Pennsylvania Infrastructure Inv. Auth. of Com., 81 A.3d 1031, 1041 (Pa. Cmwlth. Ct. 2013) (citing Orbisonia–Rockhill Joint Mun. Auth. v. Cromwell Twp., 978 A.2d 425, 428 (Pa. Cmwlth. Ct. 2009)).

2. Damages due to the result of a breach of contract are available "[w]here one party to a contract, without any legal justification, breaches the contract, the other party is entitled to recover, unless the contract provides otherwise, whatever damages he suffered, provided (1) they were such as would naturally and ordinarily result from the breach, or (2) they were reasonably foreseeable and within the contemplation of the parties at the time they made the contract, and (3) they can be proved with reasonable certainty." Logan v. Mirror Printing Co. of Altoona, Pa., 600 A.2d 225, 226 (Pa. Super. Ct. 1991) (quoting Taylor v. Kaufhold, 84 A.2d 347, 351 (Pa. Super. Ct. 1951)).

3. Damages from a breach of contract must be proven "with reasonable certainty." Logan v. Mirror Printing Co. of Altoona, Pa., 600 A.2d 225, 226 (Pa. Super. Ct. 1991) (citing Wilcox v. Regester, 207 A.2d 817 (Pa. 1965)).

4. A Court cannot refuse to award a party damages from a breach of contract merely because that party cannot produce evidence of the exact amount of damages; the law requires that a party show a basis for the assessment of damages "with a fair degree of probability." Massachusetts Bonding & Ins. Co. v. Johnston & Harder, Inc., 22 A.2d 709 (Pa. 1941).

Civil Law- Real Estate Settlement Procedures Act

1. The Real Estate Settlement Procedures Act assists in preventing banks from imposing inappropriate fees. 12 U.S.C. § 2607.

2. "Any Real Estate Settlement Procedures Act action pursuant to the provisions of [12 U.S. C.] section 2605, 2607, or 2608 . . . may be brought in the United States district court or in any other court of competent jurisdiction, for the district in which the property involved is located, or where the violation is alleged to have occurred, within 3 years in the case of a violation of section 2605 [servicing of mortgage loans and administration of escrow accounts] . . . and 1 year in the case of a violation of section 2607 [prohibition against kickbacks and unearned fees] or 2608 [title companies; liability of seller] . . . from the date of the occurrence of the violation, except that actions brought by the Bureau, the Secretary, the Attorney General of any State, or the insurance commissioner of any State may be brought within 3 years from the date of the occurrence of the violation." 12 U.S.C. §2614.

3. The Real Estate Settlement Procedures Act does not apply to loans on a property of 25 acres or more. 24 C.F.R. §3500.5(b)(1).

4. The Real Estate Settlement Procedures Act is not a valid defense to an action that seeks to enforce a note securing real property. 12 U.S.C. §2615.

5. No statutory provision in the Real Estate Settlement Procedures Act "shall affect the validity or enforceability of any sale or contract for the sale of real property or any loan,

loan agreement, mortgage, or lien made or arising in connection with a federally related mortgage loan." 12 U.S.C. §2615.

Civil Law- Home Ownership and Equity Protection Act

1. The Home Ownership and Equity Protection Act prevents lenders from "mak[ing] a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan, according to its terms, and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments." 15 U.S.C. §1639c.

2. Generally, "any action under [a Home Ownership and Equity Protection Act] claim may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation or, in the case of a violation involving a private education loan (as that term is defined in section 1650(a) . . .), 1 year from the date on which the first regular payment of principal is due under the loan. Any action under [the Home Ownership and Equity Protection Act] . . . with respect to any violation of section 1639 [relating to disclosures],1639b [relating to residential mortgage loan origination], or 1639c [relating to making a residential mortgage loan upon review of verified and documented information] . . . may be brought in any United States district court, or in any other court of competent jurisdiction, before the end of the 3-year period beginning on the date of the occurrence of the violation." 15 U.S.C. §1640(e).

3. A violation under 15 U.S.C. §1640(e) occurs when a consumer executes a contract that makes them obligated in a credit transaction. 12 C.F.R. §226.2(a)(13).

4. In analyzing whether a mortgage loan is covered under the Home Ownership and Equity Protection Act, a Court must first determine whether the mortgage loan is a "consumer credit transaction," as defined in 15 U.S.C. § 1602(h). Nelson v. JPMorgan Chase Bank, N.A., 707 F. Supp. 2d 309, 313 (E.D.N.Y. 2009) (citations omitted).

5. Next, the Court must determine if the mortgage loan is a consumer credit transaction with a "creditor," as defined in 15 U.S.C. § 1602(f). Nelson v. JPMorgan Chase Bank, N.A., 707 F. Supp. 2d 309, 313 (E.D.N.Y. 2009) (citations omitted).

6. Third, the Court's analysis must include a discussion if the mortgage loan is be secured by the "consumer's principal dwelling," as defined with reference to the definition of "dwelling" in 15 U.S.C. § 1602(v). Nelson v. JPMorgan Chase Bank, N.A., 707 F. Supp. 2d 309, 313 (E.D.N.Y. 2009) (citations omitted).

7. Fourth, the mortgage loan must be a second or subordinate residential mortgage, not a "residential mortgage transaction," a "reverse mortgage transaction," or a transaction under an "open credit plan." Nelson v. JPMorgan Chase Bank, N.A., 707 F. Supp. 2d 309, 313 (E.D.N.Y. 2009) (citations omitted).

8. Fifth, the Court must find that the mortgage loan at issue satisfies either of two tests set forth in 15 U.S.C. § 1602(aa)(1). The first test applies when the annual percentage rate of interest for the loan transaction exceeds certain levels. See 15 U.S.C. § 1602(aa)(1)(A). The second test applies when the total "points and fees" payable by the borrower at or before closing will exceed the greater of—(i) 8 percent of the total loan amount; or (ii) $400. Nelson v. JPMorgan Chase Bank, N.A., 707 F. Supp. 2d 309, 313 (E.D.N.Y. 2009) (citations omitted).

9. The Home Ownership and Equity Protection Act generally "appl[ies] to a consumer credit transaction that is secured by the consumer's principal dwelling, and in which either: (i) The annual percentage rate at consummation will exceed by more than 8 percentage points for first-lien loans . . . the yield on Treasury securities having comparable periods of maturity to the loan maturity as of the fifteenth day of the month immediately preceding the month in

which the application for the extension of credit is received by the creditor; or (ii) The total points and fees payable by the consumer at or before loan closing will exceed the greater of 8 percent of the total loan amount, or $400; the $400 figure shall be adjusted annually on January 1 by the annual percentage change in the Consumer Price Index that was reported on the preceding June 1." 12 C.F.R. §226.32.

10. For purposes of determining whether a mortgage loan meets the first test of the fifth prong of the Home Ownership and Equity Protection Act, the court must conclude whether the annual percentage rate of interest for the loan transaction exceeds certain levels by comparing the Annual Percentage Rate ("APR") in question to the relevant treasury rate. See 12 C.F. R. §226.32(a)(1)(i).

11. To determine the relevant Home Ownership and Equity Protection Act rate trigger, federal regulations demand lenders use treasury rates as of the 15th day of the month preceding the loan application date. 12 C.F.R. §226.32.

12. Regarding the second test of the fifth prong of the determination as to whether a mortgage loan applies to the Home Ownership and Equity Protection Act, "points and fees" are defined as "(1) all items included in the finance charge, except interest or the time-price differential; (2) all compensation paid directly or indirectly by a consumer or creditor to a mortgage originator from any source, including a mortgage originator that is also the creditor in a table-funded transaction; (3) each of the charges listed in [15 U.S. C.]section 1605(e) . . . (except an escrow for future payment of taxes), unless-- (i) the charge is reasonable; (ii) the creditor receives no direct or indirect compensation; and (iii) the charge is paid to a third party unaffiliated with the creditor; and (4) premiums or other charges payable at or before closing for any credit life, credit disability, credit unemployment, or credit property insurance, or any other accident, loss-of-income, life or health insurance, or any payments directly or indirectly for any debt cancellation or suspension agreement or contract, except that insurance premiums or debt cancellation or suspension fees calculated and paid in full on a monthly basis shall not be considered financed by the creditor; (5) the maximum prepayment fees and penalties which may be charged or collected under the terms of the credit transaction; (6) all prepayment fees or penalties that are incurred by the consumer if the loan refinances a previous loan made or currently held by the same creditor or an affiliate of the creditor; and (7) such other charges as the Bureau determines to be appropriate." 15 U.S.C. §1602(aa)(4).

13. "Total loan amount" in the second test of the fifth prong to determine if a mortgage loan is covered under the Home Ownership and Equity Protection Act is defined as the financed amount, not including any reasonable charges of which the creditor receives no compensation from and the charge is likewise not paid to an affiliate. 12 C.F.R. §226.32(b)(1)(iii).

14. To calculate the amount financed, the Court must (1) determine "the principal loan amount or cash price (subtracting any downpayment);" (2) add "any other amounts that are financed by the creditor and are not part of the finance charge;" and (3) subtract "any prepaid finance charge." 12 C.F.R. §226.18.

15. To calculate the "total loan amount," the Court should take the total prepaid finance charge and subtract it from the original principal amount of the loan. 12 C.F.R. §226.32.

16. The finance charge in a consumer credit transaction is generally "the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. The finance charge does not include charges of a type payable in a comparable cash transaction. The finance charge shall not include fees and amounts imposed by third party closing agents (including settlement agents, attorneys, and escrow and title companies) if the creditor does not require the imposition of the charges or the services provided and does not retain the charges." 15 U.S.C. §1605(a).

Civil Law- Predatory Lending Cause of Action or Defense

1. In Pennsylvania, predatory lending is not a legally cognizable claim or defense. See In re McConnell, 390 B.R. 170, 182 (W.D. Pa. 2008); Soverign Bank v. GawronSoverign Bank v. Gawron, 13 Pa. D. & C. 5th 71, 79-80 (Ct. Com. Pl. Lackawanna Cnty. 2010).

2. In the borrower-lender relationship, there is typically no fiduciary duty present. Dommel Props., LLC v. Jonestown Bank & Trust Co., 2013 U.S. Dist. Lexis 37343, at *58 (M.D. Pa. March 19, 2013) (citing Federal Land Bank of Baltimore v. Fetner, 410 A.2d 344, 348 (Pa. Super. Ct. 1979)).

3. The borrower-lender relationship usually involves an arms-length transaction with parties acting in their own interest. Busy Bee, Inc. v. Wachovia Bank, N.A., No. 97 CV 5078, 2006 WL 723487, at *22 (Pa. Com. Pl. Feb. 28, 2006) aff'd sub nom. Busy Bee v. Wachovia Bank, 932 A.2d 248 (Pa. Super. Ct. 2007) (citing Temp-Way Corp. v. Continental Bank, 139 B.R. 299, 318 (Bankr. E.D. Pa.1992), aff'd, 981 F.2d 1248 (3rd Cir.1992)).

4. The instance where the borrower-lender relationship is not arms-length is by operation of law where the "bank exercises substantial control over the borrower's business affairs." Busy Bee, Inc. v. Wachovia Bank, N.A., No. 97 CV 5078, 2006 WL 723487, *22 (Pa. Com. Pl. Feb. 28, 2006) aff'd sub nom. Busy Bee v. Wachovia Bank, 932 A.2d 248 (Pa. Super. Ct. 2007) (citing G.E. Capital Mortgage Services, Inc. v. Pinnacle Mortgage Investment Corp., 897 F.Supp. 854, 863 (E.D.Pa.1995); Blue Line Coal Co., Inc. v. Equibank, 683 F.Supp. 493, 496 (E.D.Pa.1988); Stainton v. Tarantino, 637 F.Supp. 1051, 1066 (E.D.Pa.1986)).

5. In addition, even where the parties agree to a contractual provision of good faith, a lender still usually remains free from liability for harming a borrower for failing "to advance additional funds, release collateral, or assist in obtaining loans from third persons." Cable & Associates Ins. Agency, Inc. v. Commercial Nat. Bank of Pennsylvania, 875 A.2d 361, 364 (Pa. Super. Ct. 2005).

6. A lending bank has no obligation, absent a contractual provision or agreement to the contrary, to assist a borrower in selling land for the purpose of paying off a mortgage loan. Dommel Props., LLC v. Jonestown Bank & Trust Co., 2013 U.S. Dist. Lexis 37343, *58 (M.D. Pa. March 19, 2013) (citing Federal Land Bank of Baltimore v. Fetner, 410 A.2d 344, 348 (Pa. Super. Ct. 1979)).

Civil Law- Claims of Fraud

1. Averments of fraud should be pled with particularity. Pa. R. Civ. P. 1019(b).

2. The mere failure to perform an action as promised is not fraud. Busy Bee, Inc. v. Wachovia Bank, N.A., No. 97 CV 5078, 2006 WL 723487, *22 (Pa. Com. Pl. Feb. 28, 2006) aff'd sub nom. Busy Bee v. Wachovia Bank, 932 A.2d 248 (Pa. Super. Ct. 2007) (citing eToll, Inc. v. Elias/Savion Adver., Inc., 811 A.2d 10, 16 n.6 (Pa. Super. Ct. 2002)).

3. When a party makes a promise but has no intention of keeping that promise at the time it was made, fraud may be present. Busy Bee, Inc. v. Wachovia Bank, N.A., No. 97 CV 5078, 2006 WL 723487, *22 (Pa. Com. Pl. Feb. 28, 2006) aff'd sub nom. Busy Bee v. Wachovia Bank, 932 A.2d 248 (Pa. Super. Ct. 2007) (quoting Precision Printing Co., Inc. v. Unisource Worldwide, Inc., 993 F.Supp. 338, 356 (W.D. Pa. 1998); Fox's Food, Inc. v. K-Mart Corp.,870 F.Supp. 599, 609 (M.D. Pa. 1994)).

4. When a party makes a statement that does not reflect their true intent at the time it is made, said statements are fraudulent misrepresentations. College Watercolor Group, Inc. v. William H. Newbauer, Inc., 360 A.2d 200, 206 (Pa. 1976).

5. To convince another to perform an act that is not what she thinks it is, said convincing

is potentially fraudulent. Busy Bee, Inc. v. Wachovia Bank, N.A., No. 97 CV 5078, 2006 WL 723487, *22 (Pa. Com. Pl. Feb. 28, 2006) aff'd sub nom. Busy Bee v. Wachovia Bank, 932 A.2d 248 (Pa. Super. Ct. 2007) (quoting Delahanty v. First Pennsylvania Bank, N.A., 464 A.2d 1243, 1252 (Pa. Super. Ct. 1983); Greenwood v. Kadoich,357 A.2d 604, 607 (Pa. Super. Ct. 1976)).

Appearances:

Henry F. Reichner, Esq., *Attorney for Plaintiff*

Richard H. Wix, Esq., *Attorney for Defendant*

OPINION

Before Meyers, J.

This matter involves Plaintiff's, Wells Fargo Bank, *Motion for Summary Judgment* in a breach of contract action.

FACTS AND PROCEDURAL HISTORY

On November 20, 2006, Defendant, Shirley A. Norris, borrowed a $290,700.00 loan from Wells Fargo. Defendant signed a Fixed Rate Note, which was secured by a mortgage on a property located at 597 Nature Lane, Warfordsburg, PA 17267. The Note had an annual rate of 8.950%. The mortgage securing the Note is recorded in the Office of the Recorder of Deeds of the County of Fulton in Mortgage Book 464, at Page 411. Defendant has not made required payments that were due on February 1, 2007 and each month thereafter.

Plaintiff gave Defendant notice of default via a September 30, 2008 letter to Defendant.

Plaintiff filed a Complaint on December 4, 2008 that alleged Breach of Contract, sought to Quiet Title, and sought Specific Performance for failure to make timely payments as required by the Note. Plaintiff seeks $342,165.36 due under the Note along with interest from November 3, 2008 at the rate of $63.72 per diem, and other costs and charges collectible under the Note. Plaintiff's Civil Action/Complaint. Plaintiff previously also sought to Quiet Title based on the assertion that "Defendant warranted and promised to defend title to the property and further promised that she was lawfully seised (sic) of the property in which she granted Plaintiff a mortgage interest." Id. at Paragraph 16.[1]

1 In its May 27, 2015 Memorandum of Law, Plaintiff stated its intention of only proceeding on its Breach of Contract claim and withdrawing the Quiet Title and Specific Performance claims. Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, Page 1.

On January 22, 2008, the Defendant filed an Answer with New Matter. Defendant alleges "that due to the wrongful actions of the Plaintiff as set forth in Defendant's New Matter, Defendant signed the Promissory Note" and executed the mortgage. Defendant's Answer With New Matter, Paragraphs 3 and 4. In addition, Defendant states that due to "the wrongful acts of the Plaintiff," Defendant has failed to make payments since February 1, 2007. Id. at Paragraph 3. Defendant further claims that the mortgage is invalid since no subdivision plan existed at the time the mortgage was executed. Id. at Paragraph 14. Defendant also claims that her boyfriend swindled money from her stating that he was funding an investment but he never paid her back. Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Page 2. Plaintiff responds that "Defendant knew or should have known that there was no subdivision plan at the time she executed the mortgage." Plaintiff's Civil Action/Complaint at Paragraph 15. Defendant claims that since "Plaintiff had the obligation to have a subdivision plan prepared and approved[,] . . . Defendant had no reason to believe that Plaintiff was not doing so in a timely manner." Defendant's Answer With New Matter, Paragraph 15. Defendant further asserts that Wells Fargo instituted foreclosure proceedings against her and placed a Lis Pendens on her property instead of working with her. Defedant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Page 2.

Defendant claims, in her New Matter, that Plaintiff violated the Real Estate Settlement Procedures Act (RESPA) when it "imposed excessive and unwarranted settlement fees, as well as misrepresent[ed] the amounts that Defendant would have to pay." Defendant's Answer With New Matter, Paragraph 36. In addition, Defendant alleges that Plaintiff engaged in predatory lending when it imposed excessive fees, loan flipped, made a loan to Defendant when it knew or should have known that Defendant could not afford it, and it made a kickback to the Mortgage Broker. Id. at Paragraph 37.

Moreover, Defendant asserts that Plaintiff "knew or should have known that Defendant did not have adequate income to pay a mortgage in the amount that was extended by the Plaintiff." Id. at Paragraph 32. Defendant states "that Plaintiff knew that on or about September 12, 2005, Defendant previously executed a mortgage on the property at 597 Nature Lane, Warfordsburg, Pennsylvania in the amount of $208,000.00." Id. at Paragraph 30. Plaintiff claims that the mortgage at issue is a refinance. In other words, the prior mortgage that Defendant references in her answer was paid off at the time of closing. Plaintiff's Reply to Defendant's New Matter, Paragraph 30. According to Plaintiff, "Defendant received the benefit of the mortgage loan as approximately $59,954.44 was disbursed to Defendant

at closing." Id. Plaintiff argues that the $59,954.44 was used "for a long overdue family vacation and [assistance] with a wedding." Plaintiff's Motion for Summary Judgment, Paragraph 11. Defendant claims that the $59,954.44 was "swindled" from her. Defendant's Answer to Plaintiff's Motion for Summary Judgment, Paragraph 11. The balance of the proceeds was used to pay off her existing mortgage in the amount of $210,867.90. Plaintiff's Motion for Summary Judgment, Paragraph 12.

In addition, during the year of 2006, Defendant's Federal Income Tax Return evidenced that she had a gross income of $15,235.00. Defendant's Answer With New Matter, Paragraph 29. Defendant claims that the only significant asset she had at the time the mortgage was executed was her home at 597 Nature Lane, Warfordsburg, Pennsylvania. Id. at Paragraph 28. Moreover, at the time the Plaintiff extended Defendant a mortgage, Defendant claims her credit score was only 549. Id. at Paragraph 31.

Further, Defendant asserts that the mortgage was covered by the Home Ownership and Equity Protection Act ("HOEPA") and Plaintiff acted in violation of the HOEPA. Id. at Paragraph 33. Defendant states that Plaintiff acted in violation of HOEPA by "engag[ing] in a practice of extending HOEPA loans based upon the value of the home without regard to the consumer's ability to repay from other sources other than home equity." Id. at Paragraph 34.

Defendant filed a counterclaim based on her New Matter, including her claim of predatory lending, claiming she is entitled to receive compensatory damages, punitive damages, interest, and attorneys' fees. Id. at Paragraph 39.

On May 27, 2015, Plaintiff filed its Motion for Summary Judgment and Memorandum of Law in Support Thereof. On June 12, 2015, Plaintiff requested that this Court decide the Motion for Summary Judgment on the briefs alone and without argument. On July 13, 2015, Defendant filed her answer to Plaintiff's Motion for Summary Judgment and on July 16, 2015, Defendant filed her Memorandum in Opposition to Plaintiff's Motion for Summary Judgment. On July 28, 2015, Plaintiff filed a Reply Brief in Support of its Motion for Summary Judgment.

This Court is prepared to decide Plaintiff's Motion for Summary Judgment without the need for argument.

ANALYSIS

Before this Court is Plaintiff's May 27, 2015 *Motion for Summary Judgment*. Summary judgment is designed to dispose of cases where a party does not state a claim or defense after completion of *relevant* discovery,

even though the party's pleadings may state a valid cause of action or defense. Miller v. Sacred Heart Hosp., 753 A.2d 829, 833 (Pa. Super. Ct. 2000); Amiable v. Auto Kleen Car Wash, 376 A.2d 247, 250 (Pa. Super. Ct. 1977).

A party may move for partial summary judgment or full summary judgment after the relevant pleadings are closed but within such time as to not unreasonably delay trial. PA. R. CIV. P. 1035.2. A party bearing the burden of proof at trial is entitled to summary judgment if "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." PA. R. CIV. P. 1035.2(1). A party who will not have the burden of proof at trial is entitled to summary judgment

> 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.

PA. R. CIV. P. 1035.2(2). A party responding to a motion for summary judgment may not merely rest upon the pleadings, but rather must identify one or more issues of material fact (1) arising from evidence in the record controverting the evidence cited in support of the motion; (2) by challenging the credibility of the witness or witnesses testifying in favor of the motion; or (3) identifying record evidence essential to the claim or defense that the motion avers was not produced.[2] PA. R. CIV. P. 1035.3(a); see Phaff v. Gerner, 303 A.2d 826, 829 (Pa. 1975); Accu-Weather, Inc. v. Prospect Commc'ns, Inc., 644 A.2d 1251, 1254 (Pa. Super. Ct. 1994). In determining whether summary judgment is appropriate, the Court must view the record in the light most favorable to the non-moving party. Manzetti v. Mercy Hosp. of Pittsburgh, 776 A.2d 938, 945 (Pa. 2001).

1. MERITS OF WELLS FARGO'S CLAIMS

This Court notes that Plaintiff had previously sought three claims in its Complaint: (1) Breach of Contract, (2) Quiet Title, and (3) Specific Performance. However, in its May 27, 2015 Memorandum of Law, Plaintiff stated its intention of only proceeding on its Breach of Contract claim. Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, Page 1. As a result, this Court will only analyze the

2 A party is not entitled to summary judgment if the motion is based upon its own witnesses' testimony. Pa. R.C.P. 1035.3(a) (citing Nanty-Glo v. Am. Sur. Co., 163 A. 523 (Pa. 1932)); Porterfield v. Trs. Of Hosp. of Univ. of Pa. 657 A.2d 1293, 1294-95 (Pa. Super. Ct. 1995). The Nanty-Glo rule does not apply in this case, because the motion is based almost entirely on documents.

Breach of Contract claim.

a. BREACH OF CONTRACT

In Pennsylvania, "[t]he elements of a breach of contract are (1) the existence of a contract, (2) a breach of the duty imposed by the contract and (3) damages resulting from the breach." Sewer Auth. of City of Scranton v. Pennsylvania Infrastructure Inv. Auth. of Com., 81 A.3d 1031, 1041 (Pa. Cmwlth. Ct. 2013) (citing Orbisonia–Rockhill Joint Mun. Auth. v. Cromwell Twp., 978 A.2d 425, 428 (Pa. Cmwlth. Ct. 2009)). In addition, a party is entitled to receive damages for a breach of contract

> [w]here one party to a contract, without any legal justification, breaches the contract, the other party is entitled to recover, unless the contract provides otherwise, whatever damages he suffered, provided (1) they were such as would naturally and ordinarily result from the breach, or (2) they were reasonably foreseeable and within the contemplation of the parties at the time they made the contract, and (3) they can be proved with reasonable certainty.

Logan v. Mirror Printing Co. of Altoona, Pa., 600 A.2d 225, 226 (Pa. Super. Ct. 1991) (quoting Taylor v. Kaufhold, 84 A.2d 347, 351 (Pa. Super. Ct. 1951)). "[A] party seeking damages for breach of contract 'must be able to prove such damages with reasonable certainty.'" Id. (citing Wilcox v. Regester, 207 A.2d 817 (Pa. 1965)). "Compensation for breach of contract cannot be justly refused because proof of the exact amount of loss is not produced ... [T]he law does require ... that the evidence shall with a fair degree of probability establish a basis for the assessment of damages." Massachusetts Bonding & Ins. Co. v. Johnston & Harder, Inc., 22 A.2d 709 (Pa. 1941).

Here, upon this Court's review of the Plaintiff's and Defendant's filings, there appears to be a contract in existence. The only issue is whether Plaintiff acted wrongfully in having Defendant execute the contract.

Pursuant to the terms of the Note, in exchange for a loan, Defendant agreed to repay the principal plus interest in monthly payments, with the first payment on September 1, 2006, and every first day of each month thereafter. Plaintiff's Motion for Summary Judgment, Paragraph 22 and Exhibit E. The Note references the mortgage and outlines the terms of any default. Id. at Paragraph 23, Exhibit E. Defendant concurred "that if she did not pay the full amount of each payment on the date it was due, or if she did not fulfill any of her other promises under the Note or [m]ortgage, she would be in breach of her duties." Id. at Paragraph 24, Exhibit E. Therefore, a contract was in existence.

In addition, Defendant breached her agreed upon duty. Plaintiff and Defendant agree that Defendant has failed to make her payments under the mortgage. Id. at Paragraph 25; Defendant's Answer to Plaintiff's Motion for Summary Judgment, Paragraph 25. Defendant, however, states that "Plaintiff also refused to cooperate with Defendant to sell the land [that was not going] to be covered by the [m]ortgage, which would have enabled Defendant to pay the [m]ortgage." Id. at Paragraph 25. Defendant also admits to failing to pay property taxes and homeowners insurance payments under the Note. Id. at Paragraph 26. Plaintiff states that Defendant's failures to pay the Note, taxes, and keep the Property insured have resulted in Plaintiff suffering damages and entitling it to judgment in its favor under the full amount due under the loan. Plaintiff's Motion for Summary Judgment, Paragraph 27. Thus, there was a duty imposed by the contract and damages from breach of that duty.

However, Defendant counters that any damages that Plaintiff suffered were due to its own negligence and violation of the law in the manner it obtained the Note and the mortgage from the Defendant, as well as its own failure to file the subdivision plan. Defendant's Answer to Plaintiff's Motion for Summary Judgment, Paragraph 27.

2. DEFENDANT'S ALLEGATIONS THAT PLAINTIFF VIOLATED THE LAW

Defendant alleges three violations of law: (1) RESPA, (2) HOEPA, and (3) predatory landing. This Court will analyze each in turn.

a. RESPA

Plaintiff argues that RESPA does not apply to the Note at issue. This Court agrees.

First, Plaintiff correctly states that RESPA does not apply to mortgages "on property of 25 acres or more." Plaintiff's Motion for Summary Judgment, Paragraph 29 (citing 24 C.F.R. §3500.5(b)(1)). Defendant disputes the amount of acreage that the Mortgage covers by stating that "[t]he surveyor's record [and other records] clearly indicate[] that the Mortgage was for less than twenty-five (25) acres." Defendant's Answer to Plaintiff's Motion for Summary Judgment, Paragraph 29-30. The Plaintiff provides evidence that the Mortgage was intended to cover a property of at least 25 acres. Plaintiff's Motion for Summary Judgment, Paragraph 30 (Exhibit E to Plaintiff's Motion for Summary Judgment). Defendant claims that "as evidenced by the surveyor's description, the amount covered by the Mortgage consisted of 1,088,990.31 square feet, which would constitute less than twenty-five (25) acres." Defendant's Answer to Plaintiff's Motion

for Summary Judgment, Paragraph 3. As Defendant states, an acre of land consists of 43,560 square feet and twenty-five acres of land is 1,099,000. Id. This Court finds that the Surveyor most likely rounded up and the mortgaged property is slightly less than 25 acres. However, the inquiry into the applicability of RESPA does not end here.

Plaintiff further asserts that RESPA is not a valid defense to an action to enforce a note securing real property. Id. at Paragraph 31 (citing 12 U.S.C. §2615). Defendant disputes this claim but provides no authority in support of the opposition. Defendant's Answer to Plaintiff's Motion for Summary Judgment, Paragraph 31. Upon a reading of 12 U.S.C. §2615, this Court finds that it is clear that Plaintiff is correct. Section 2615 states that no provision in RESPA, "shall affect the validity or enforceability of any sale or contract for the sale of real property or any loan, loan agreement, mortgage, or lien made or arising in connection with a federally related mortgage loan." 12 U.S.C. §2615. Again, Defendant does not even provide facts or authority of any kind to support her proposition that RESPA applies to the mortgage at hand. Therefore, this Court finds that Section 2615 supports Plaintiff's claim that RESPA is not a valid defense to an action to enforce a note securing real property.

Third, Defendant claims that "Plaintiff violated [RESPA] by imposing excessive and unwarranted settlement fees, as well as misrepresenting the amounts that Defendant would have to pay." Defendant's Answer with New Matter to Plaintiff's Complaint, Paragraph 36. Plaintiff correctly asserts that the Defendant never "points to [any] specific excessive or unwarranted settlement fee charged to her at her loan closing, nor does she identify any misrepresented amount that she paid or would have to pay." Plaintiff's Motion for Summary Judgment, Paragraph 32. Defendant just makes vague and blanket assertions but does not submit any evidence of excessive or unwarranted settlement fees nor any misrepresentation. Defendant merely refers to the settlement sheet having "numerous excessive charges." Defendant's Answer to Plaintiff's Motion for Summary Judgment, Paragraph 32. This Court finds that, in reality, the amounts that Plaintiff owed were clearly disclosed on HUD-1 forms and loan documents. Plaintiff's Motion for Summary Judgment, Exhibit E. Defendant executed the forms and there are no facts of record to show that there were any excessive fees or misrepresentations. Therefore, this Court finds that Defendant's RESPA defense is without merit .

b. HOEPA

Next, Defendant alleges that the loan in question violates HOEPA and disclosure requirements relating to HOEPA. Defendant asserts that the

bank illegally extended a loan to a consumer "under [a] mortgage based on the consumer's collateral without regard to the consumer's repayment ability, including the consumer's current and expected income, current obligations and employment." Defendant's Answer to Plaintiff's Motion for Summary Judgment, Paragraph 35. Defendant claims that Plaintiff's representative, Brenda Hurst, stated at her deposition that the loan to Defendant was not made on the basis of Defendant's earnings and that Defendant's credit rating was poor at best. Id. (citing Page 43 of Deposition). The loan was allegedly based on the strength of the collateral. Id. (citing Page 45 of Deposition).

Plaintiff, however, claims that HOEPA is not applicable to the instant matter as "the points and fees charged to Defendant do not exceed either the rate or the points and fees trigger set forth in HOEPA." Plaintiff's Motion for Summary Judgment, Paragraph 35.

The United States District Court for the Eastern District of New York has outlined when HOEPA is applicable:

> First, the mortgage loan must be a "consumer credit transaction," as defined in 15 U.S.C. § 1602(h). Second, the mortgage loan must be a consumer credit transaction with a "creditor," as defined in 15 U.S.C. § 1602(f). Third, the mortgage loan must be secured by the "consumer's principal dwelling," as defined with reference to the definition of "dwelling" in 15 U.S.C. § 1602(v). Fourth, the mortgage loan must be a second or subordinate residential mortgage, not a "residential mortgage transaction," a "reverse mortgage transaction," or a transaction under an "open credit plan." Fifth, the mortgage loan must satisfy either of two tests set forth in 15 U.S.C. § 1602(aa)(1). The first test applies when the annual percentage rate of interest for the loan transaction exceeds certain levels. See 15 U.S.C. § 1602(aa)(1)(A). The second test applies when the total "points and fees" payable by the borrower at or before closing will exceed the greater of—(i) 8 percent of the total loan amount; or (ii) $400.

Nelson v. JPMorgan Chase Bank, N.A., 707 F. Supp. 2d 309, 313 (E.D.N.Y. 2009) (citations omitted). It is undisputed the first three elements are met. The mortgage is a consumer credit transaction, entered into with Wells Fargo, a creditor, and secured by Defendant's principal dwelling. Fourth, the mortgage loan was a second residential mortgage. See Plaintiff's Motion for Summary Judgment, Paragraphs 11 and 12 and Exhibits E and F. Thus, the mortgage loan here meets prongs one, two, three, and four.

As to test one of the fifth prong, in order to determine whether the

annual percentage rate of interest for the loan transaction exceeds certain levels, the reviewing court must compare the Annual Percentage Rate ("APR") in question to the relevant treasury rate. 12 C.F. R. §226.32(a)(1)(i). Pursuant to 12 C.F.R. § 226.32,

> (1) Except as provided in paragraph (a)(2) of this section, the requirements of this section apply to a consumer credit transaction that is secured by the consumer's principal dwelling, and in which either:
>
> (i) The annual percentage rate at consummation will exceed by more than 8 percentage points for first-lien loans . . . the yield on Treasury securities having comparable periods of maturity to the loan maturity as of the fifteenth day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor; or
>
> (ii) The total points and fees payable by the consumer at or before loan closing will exceed the greater of 8 percent of the total loan amount, or $400; the $400 figure shall be adjusted annually on January 1 by the annual percentage change in the Consumer Price Index that was reported on the preceding June 1.

12 C.F.R. §226.32.

In determining the relevant HOEPA rate trigger, the regulations require lenders to use treasury rates as of the 15th day of the month preceding the application date. Id. The Loan Application Defendant signed is dated July 11, 2006. See Plaintiff's Motion for Summary Judgment, Exhibit E. As such, this Court must use the treasury rates for June 15, 2006. This Court finds that Plaintiff is correct and "[t]he yield for the treasury security with a constant maturity that is closest to the Defendant's 30-year loan term would be securities with a 30-year constant maturity." Plaintiff's Motion for Summary Judgment, Paragraph 30. Therefore, looking at the yield on securities as of June 15, 2006, this Court finds the rate was 5.13 %. United States Department of Treasury Historical Daily Treasury Yield Curve Rates for 2006, available at http://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/TextView.aspx?data=yieldYear&year=2006 (last visited Aug. 13, 2015).

Since the APR on Defendant's loan was 8.95%, it was below the HOEPA trigger rate of 13.13% (5.13% plus 8%). See Plaintiff's Motion for Summary Judgment, Exhibit E. Therefore, Defendant's loan does not meet

the first test of the fifth prong.

As to the second test of the fifth prong, HOEPA defines "points and fees" as

> (A) all items included in the finance charge, except interest or the time-price differential;
>
> (B) all compensation paid directly or indirectly by a consumer or creditor to a mortgage originator from any source, including a mortgage originator that is also the creditor in a table-funded transaction;
>
> (C) each of the charges listed in section 1605(e) of this title (except an escrow for future payment of taxes), unless--
>
> (i) the charge is reasonable;
>
> (ii) the creditor receives no direct or indirect compensation; and
>
> (iii) the charge is paid to a third party unaffiliated with the creditor; and
>
> (D) premiums or other charges payable at or before closing for any credit life, credit disability, credit unemployment, or credit property insurance, or any other accident, loss-of-income, life or health insurance, or any payments directly or indirectly for any debt cancellation or suspension agreement or contract, except that insurance premiums or debt cancellation or suspension fees calculated and paid in full on a monthly basis shall not be considered financed by the creditor;
>
> (E) the maximum prepayment fees and penalties which may be charged or collected under the terms of the credit transaction;
>
> (F) all prepayment fees or penalties that are incurred by the consumer if the loan refinances a previous loan made or currently held by the same creditor or an affiliate of the creditor; and
>
> (G) such other charges as the Bureau determines to be appropriate.

15 U.S.C. §1602(aa)(4). "Total loan amount" in 12 C.F.R. §226.32(1)(ii) is defined as the financed amount minus any reasonable charges of which the creditor receives no compensation from and the charge is not paid to an affiliate. 12 C.F.R. §226.32(b)(1)(iii). The amount financed is calculated by "(1) Determining the principal loan amount or the cash price (subtracting

any downpayment); (2) Adding any other amounts that are financed by the creditor and are not part of the finance charge; and (3) Subtracting any prepaid finance charge." 12 C.F.R. §226.18.

Again, Defendant has failed to explicitly state which fees were unreasonable, misrepresented, or excessive. Plaintiff asserts that even if every closing fee was included in the HOEPA calculation, which is legally incorrect as some should be excluded, the 8% HOEPA threshold will still not be met.

This Court has reviewed the relevant HUD-1 closing statement and found that every fee charged to Defendant results in a cost of approximately $19,220.00. Plaintiff's Motion for Summary Judgment, Exhibit E. To calculate the "total loan amount," one should subtract the total prepaid finance charge from the original principal amount of the loan. 12 C.F.R. §226.32. The finance charge is defined as:

> Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. The finance charge does not include charges of a type payable in a comparable cash transaction. The finance charge shall not include fees and amounts imposed by third party closing agents (including settlement agents, attorneys, and escrow and title companies) if the creditor does not require the imposition of the charges or the services provided and does not retain the charges.

15 U.S.C. §1605(a). This court has calculated the total loan amount to be approximately $270,850.00 ($290,070.00-$19,220.00) as it has charged every fee to Defendant for the sake of ease. Using this loan amount in the relevant calculation does not result in a percentage that exceeds 8 percent of the loan amount ($19,220.00 / $270,850.00= 7.1%). Thus, this is not a high-cost loan under HOEPA and the second-test of the fifth prong fails. Therefore, Defendant's HOEPA defense is without merit.

c. PREDATORY LENDING

Defendant next alleges that Plaintiff engaged in predatory lending. Defendant's Answer With New Matter, Paragraph 37. Primarily, this Court notes, that predatory lending is not a cause of action or defense in Pennsylvania. See In re McConnell, 390 B.R. 170, 182 (W.D. Pa. 2008)

("As an initial matter, the Court acknowledges that there is no common law cause of action for 'predatory lending.' Any claim for relief for predatory lending practice must be supported by some statutory basis . . . ."); Soverign Bank v. GawronSoverign Bank v. Gawron, 13 Pa. D. & C. 5th 71, 79-80 (Ct. Com. Pl. Lackawanna Cnty. 2010) (outlining various approaches to predatory lending matters).

Defendant also provides no support for her broad assertions that Plaintiff assessed excessive fees, engaged in loan flipping, and sent a kickback to the Mortgage Broker. Defendant's Answer With New Matter, Paragraph 37. In fact, Plaintiff states that there is no factual support for these claims in the record and Defendant, instead of providing support, merely responds to Plaintiff pointing out Defendant's lack of support of these claims with "Denied." See Defendant's Answer to Plaintiff's Motion for Summary Judgment Paragraph 62.

Plaintiff disputes that it provided a loan even though it knew or should have known that the Defendant could not afford to pay it back. Plaintiff's Motion for Summary Judgment, Paragraph 63. Defendant signed and initialed the loan document on each page and indicated that she had $8,990 in income per month. See Id. at Exhibit E. While Defendant denies that she filled in the application or read the application, her signature is on the bottom of every page of the loan application and she "certified that 'she underst[ood] that it is a Federal crime punishable by fine or imprisonment, or both, to knowingly make any false statements concerning any of the' representations in the Loan Application." Id. at Paragraph 65-66 and Exhibit E; Defendant's Answer to Plaintiff's Motion for Summary Judgment, Paragraph 65. Defendant stated that her yearly income is $15,000 in her New Matter but stated that her monthly income was $8,990 on the Loan Application. Defendant's Answer With New Matter, Paragraph 29; Plaintiff's Motion for Summary Judgment, Exhibit E.

This Court finds that the record shows that Defendant made numerous representations to the bank concerning her ability to repay the mortgage and those representations were taken into account along with the Defendant's credit score. See Plaintiff's Motion for Summary Judgment, Paragraphs 68-70 and Exhibit E. Defendant admits that the loan documentations showed the monthly mortgage payments due. Defendant Answer to Plaintiff's Motion for Summary Judgment Paragraph 71. Defendant however claims that she has a limited education and was a victim of fraud as Plaintiff "engaged in predatory lending by having Defendant refinancing into a loan which was substantially larger than the outstanding balance of her old loan and at a higher interest rate with the refinancing fees being added to the loan balance." Id. at Paragraph 72; See Pa. R. Civ.

P. 1019(b) (stating averments of fraud should be pled with particularity). Therefore, Defendant asserts that she was not capable of realizing that she could not pay back the loan.

However, as previously discussed, predatory lending is not a recognized claim or defense in Pennsylvania. In addition, "[t]ypically, the lender-borrower relationship does not create a fiduciary duty." Dommel Props., LLC v. Jonestown Bank & Trust Co., 2013 U.S. Dist. Lexis 37343, *58 (M.D. Pa. March 19, 2013) (citing Federal Land Bank of Baltimore v. Fetner, 410 A.2d 344, 348 (Pa. Super. Ct. 1979)). The lender and borrower relationship is usually one that is "conducted at arms-length with the parties each acting in their own interest." Busy Bee, Inc. v. Wachovia Bank, N.A., No. 97 CV 5078, 2006 WL 723487, at *22 (Pa. Com. Pl. Feb. 28, 2006) aff'd sub nom. Busy Bee v. Wachovia Bank, 932 A.2d 248 (Pa. Super. Ct. 2007) (citing Temp-Way Corp. v. Continental Bank, 139 B.R. 299, 318 (Bankr. E.D. Pa.1992), aff'd, 981 F.2d 1248 (3rd Cir.1992)).[3] Moreover, even if there is a contractual duty of good faith in this case, which there is not, "a lender generally is not liable for harm caused to a borrower for refusing to advance additional funds, release collateral, or assist in obtaining loans from third persons." Cable & Associates Ins. Agency, Inc. v. Commercial Nat. Bank of Pennsylvania, 875 A.2d 361, 364 (Pa. Super. Ct. 2005).

Therefore, this Court finds that the alleged failure of the bank to file a subdivision plan even though Defendant "was advised that Plaintiff would be filing a subdivision plan that would allow Defendant to be able to convey her other land that was not intended to be encumbered by the Note and [m]ortgage" does not prevent the entry of summary judgment. Defendant Answer to Plaintiff's Motion for Summary Judgment, Paragraph 4. First, the recorded Mortgage clearly states what part of the land is mortgaged with specific plots and that it contains 1,088,990.31 square feet of land. See Exhibit B to Plaintiff's Motion for Summary Judgment. Again, the Mortgage is publicly recorded in the Office of the Recorder of Deeds of the County of Fulton, Commonwealth of Pennsylvania, in Mortgage Book 464, at Page 411. Second, Defendant does not state how she was unable to sell the rest of the acreage that was not encumbered due to the failure of Plaintiff to file a subdivision plan as promised. For example, she does not provide evidence that another party refused or otherwise failed to purchase the unencumbered land from her due to the fact that there was no subdivision plan. Nor does she provide evidence or averments as to which agents of the Plaintiff made the comments. See Pa. R. Civ. P. 1019(b); See Defendant's

3 The one exception to the rule that the relationship is conducted at arms-length is by operation of law when "a bank exercises substantial control over the borrower's business affairs." Id. (citing G.E. Capital Mortgage Services, Inc. v. Pinnacle Mortgage Investment Corp., 897 F.Supp. 854, 863 (E.D.Pa.1995); Blue Line Coal Co., Inc. v. Equibank, 683 F.Supp. 493, 496 (E.D.Pa.1988); Stainton v. Tarantino, 637 F.Supp. 1051, 1066 (E.D.Pa.1986)). This exception does not apply to the instant matter.

Answer to Plaintiff's Motion for Summary Judgment, Paragraphs 72 and 73 (stating that Defendant was the victim of fraud). Defendant only stats that she paid the mortgage until February of 2007 and that "she approached Wells Fargo bank about having the subdivision plan recorded in order that she could sell her remaining acreage and pay off the mortgage." Defedant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Page 2. Defendant further asserts that instead of working with her, Plaintiff "instead instituted foreclosure proceedings against her, as well as placing (sic) a *Lis Pendens* on her property. Id. Therefore, Defendant alleges that she was not able to sell the unencumbered property and pay the mortgage. Id.

In addition, "[t]he mere breach of a promise to do something in the future, without more, is not fraud." Busy Bee, Inc., No. 97 CV 5078, 2006 WL 723487, at *24 (citing eToll, Inc. v. Elias/Savion Adver., Inc., 811 A.2d 10, 16 n.6 (Pa. Super. Ct. 2002)). "However, 'a promise which the promissor had no intention of keeping at the time [s]he made it may be actionable as fraud.'" Id. (quoting Precision Printing Co., Inc. v. Unisource Worldwide, Inc., 993 F.Supp. 338, 356 (W.D. Pa. 1998); Fox's Food, Inc. v. K-Mart Corp., 870 F.Supp. 599, 609 (M.D. Pa. 1994)). Indeed, "[s]tatements of intention, ... which do not, when made, represent one's true state of mind are misrepresentations known to be such and are fraudulent." College Watercolor Group, Inc. v. William H. Newbauer, Inc., 360 A.2d 200, 206 (Pa. 1976). It is also fraud to induce another "to believe that the act which [s]he does is something other than it actually is." Busy Bee, Inc., No. 97 CV 5078, 2006 WL 723487, at *24 (quoting Delahanty v. First Pennsylvania Bank, N.A., 464 A.2d 1243, 1252 (Pa. Super. Ct. 1983); Greenwood v. Kadoich, 357 A.2d 604, 607 (Pa. Super. Ct. 1976)). Defendant fails to provide evidence or assert anywhere in the record that the Plaintiff had no intent of keeping the promise of filing a subdivision plan at the time the promise was allegedly made. See Defendant' Answer to Plaintiff's Motion for Summary Judgment, Paragraph 4; Pa. R. Civ. P. 1019(b).

Lastly, Plaintiff has no obligation, unless agreed upon contractually, to assist Defendant in selling her land. Dommel Props., LLC, 2013 U.S. Dist. Lexis 37343, *58 (M.D. Pa. March 19, 2013). Furthermore, as previously stated, Plaintiff has no duty to act in good faith. Busy Bee, Inc., No. 97 CV 5078, 2006 WL 723487, at *22. Thus, this Court finds that Defendant's predatory lending arguments, including those relating to the assertion of a *Lis Pendens* and failure to file a subdivision plan, to not be valid defenses that would prevent the entry of summary judgment. Id.

3. DEFENDANT'S COUNTERCLAIMS

Defendant's counterclaims consist of two paragraphs. Defendant claims that the above-referenced violations of RESPA, HOEPA, and predatory lending entitle her to compensatory damages, punitive damages, interest, and attorneys' fees. Defendant's Answer With New Matter, Paragraphs 38 and 39. For the reasons that follow and in light of the above, this Court holds that Defendant's counterclaims are without merit.

i. RESPA

The statute of limitations on RESPA claims are as follows:

> Any action pursuant to the provisions of section 2605, 2607, or 2608 of this title may be brought in the United States district court or in any other court of competent jurisdiction, for the district in which the property involved is located, or where the violation is alleged to have occurred, within 3 years in the case of a violation of section 2605 [servicing of mortgage loans and administration of escrow accounts] of this title and 1 year in the case of a violation of section 2607 [prohibition against kickbacks and unearned fees] or 2608 [title companies; liability of seller] of this title from the date of the occurrence of the violation, except that actions brought by the Bureau, the Secretary, the Attorney General of any State, or the insurance commissioner of any State may be brought within 3 years from the date of the occurrence of the violation.

12 U.S.C. §2614.

Defendant's counterclaim alleges that Plaintiff's violated RESPA "by imposing excessive and unwarranted settlement fees, as well as misrepresenting the amounts that Defendant would have to pay." Defendant's Answer With New Matter, Paragraph 36. As these complaints are related to fees under 12 U.S.C. § 2607, Defendant would have to bring a claim under RESPA within 1 year of the violation. See 12 U.S.C. §2614. While Defendant claims that RESPA can still be used as a defense, Defendant does not say how. See Defendant's Answer to Plaintiff's Motion for Summary Judgment, Paragraph 82.

Defendant admits that the closing occurred on July 11, 2006. Id. at Paragraph 83. Therefore, the claim for any alleged RESPA violation should have been brought on or about July 11, 2007. Defendant did not assert her RESPA claim until January 21, 2009 and therefore the RESPA claim is now clearly time barred. Therefore, Defendant is prevented from asserting any claim for a RESPA violation.

ii. HOEPA

Next, Defendant alleged that Plaintiff violated HOEPA by making a loan to the Defendant that evidenced "a practice of extending HOEPA loans based upon the value of the home without regard to the consumer's ability to repay from other sources other than home equity." Defendant's Answer with New Matter, Paragraph 34. Pursuant to 15 U.S.C. §1640(e),

> Except as provided in the subsequent sentence, any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation or, in the case of a violation involving a private education loan (as that term is defined in section 1650(a) of this title), 1 year from the date on which the first regular payment of principal is due under the loan. Any action under this section with respect to any violation of section 1639 [relating to disclosures],1639b [relating to residential mortgage loan origination], or 1639c [relating to making a residential mortgage loan upon review of verified and documented information] of this title may be brought in any United States district court, or in any other court of competent jurisdiction, before the end of the 3-year period beginning on the date of the occurrence of the violation.

15 U.S.C. §1640(e).

Defendant's claim thus falls under 15 U.S.C. § 1639c and thus has a three-year, not one-year as Plaintiff alleges, statute of limitations. 15 U.S.C. §1639c provides that:

> In accordance with regulations prescribed by the Bureau, no creditor may make a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan, according to its terms, and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments.

15 U.S.C. §1639c.

Since Defendant is claiming that Plaintiff extended a loan based upon the value of the home and "without regard to the [Defendant's] ability to repay from other sources other than home equity[,]" Defendant appears to be making a claim under 15 U.S.C. §1639(c), although she never explicitly cites to the statutory provision. See Defendant's Answer With New Matter, Paragraph 34; Defendant Answer to Plaintiff's Motion

for Summary Judgment, Paragraph 35. Therefore, since Defendant's claim falls under 15 U.S.C. §1639(c), pursuant to 15 U.S.C. §1640(e), Defendant's claim has a three-year statute of limitations. A violation under 15 U.S.C. §1640(e) occurs when the transaction is consummated, which happens when "a consumer becomes contractually obligated on a credit transaction." 12 C.F.R. §226.2(a)(13).

Therefore, since Defendant and Plaintiff became contractually obligated to one another on the loan on July 11, 2006, July 11, 2006 is the violation date. Since, Defendant asserted her HOEPA claim on January 21, 2009, she filed a timely HOEPA counterclaim.

However, even though Defendant meets the relevant statute of limitations, her HOEPA claim still fails. As discussed previously, her HOEPA loan is not a "high-cost" loan. See 12 C.F.R. §226.32

iii. PREDATORY LENDING

As previously discussed, even though Defendant asserts that it is, predatory lending is not a cognizable cause of action or defense in Pennsylvania. See Defendant's Answer to Plaintiff's Motion for Summary Judgment, Paragraph 60. Therefore, Defendant cannot assert a counterclaim for predatory lending. In re McConnell, 390 B.R. at 182; Soverign Bank, 13 Pa. D. & C. 5th at 79-80.

In addition, while this Court has no reason to doubt Defendant's claim that her boyfriend absconded with money and this Court sympathizes with Defendant, the allegation that her boyfriend refused to pay her back is not a basis under the law in which to prevent the entry of summary judgment. Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Page 2. Therefore, Defendant's predatory lending counterclaim is without merit.

4. DISCOVERY

Lastly, Defendant claims that she needs additional time for discovery for the purpose of determining "whether or not Plaintiff has fully complied with all provisions of HOEPA." See Defendant's Answer to Plaintiff's Motion for Summary Judgment, Paragraphs 37-57. Defendant states that she is "aware of numerous lawsuits across the country against Wells Fargo for similar claims, and Defendant therefore requests a reasonable time to conduct discovery." Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Page 5. Defendant attached a listing from a non-governmental website that purports to show numerous cases involving Wells Fargo. Id. at Exhibit C. As it is a non-governmental website, Defendant does not provide evidence that this printout of cases is trustworthy or even relevant to the case at hand.

The discovery issue is related to a January 19, 2010 deposition of Plaintiff's representative Brenda Hurst. Id. at Page 3. During that deposition, Defendant requested various documents. Id. at Page 3-5. Defendant alleges that despite promises to supply the documents, "Plaintiff has failed to do anything since January 2010." Id. at Page 5.

However, Plaintiff asserts that Defendant served a second request of production of documents on February 10, 2010 and that request asked for the same documents that were sought during the deposition, including underwriting guidelines from Wells Fargo, documents related to a scale of credit scores as referred to on page 39 of Ms. Hurst's deposition, and HOEPA-related documents. See Plaintiff's Reply Brief in Support of Plaintiff's Motion for Summary Judgment, Page 2, Exhibit 2. Plaintiff provided written responses, which included approximately 150 pages of documents and are attached to Plaintiff's Reply Brief, on May 13, 2010. Id. at Page 2. Plaintiff alleges that, since May 13, 2010, "Defendant has never complained that the Plaintiff's post-deposition production of documents was in any way deficient." Id. Moreover, the requested documents appear to have been provided to Defendant five years ago. Id. at Page 3. Defendant has also allegedly not requested any further discovery. Id. at Page 2. Therefore, it seems that Defendant has received the requested and all relevant discovery and therefore discovery matters should not prohibit this Court from entering summary judgment. See PA. R. CIV. P. 1035.2.

This Court finds that that the cases Plaintiff relies on its *Reply Brief* are applicable to the facts of this case. "Summary Judgment may be entered prior to the completion of discovery in matters where additional discovery would not aid in the establishment of any material fact." Pappas v. UNUM Life Ins. Co. of Am., 856 A.2d 183, 186 (Pa. Super. Ct. 2004) (quoting Gatling v. Eaton Corp., 807 A.2d 283, 286 (Pa.Super.2002)). In addition, "where ample time for discovery has passed, the party seeking discovery (and opposing summary judgment) is under an obligation to show that the information sought was material to their case and that they proceeded with due diligence in their attempt to extend the discovery period." Reeves v. Middletown Athletic Ass'n, 866 A.2d 1115, 1124 (Pa. Super. Ct. 2004). Therefore, Defendant was required to supply this Court with more than mere "bald statements" that discovery is needed to investigate a potential HOEPA defense. Id. Defendant does not make a "meaningful argument . . . as to the materiality of the information sought." Id. Moreover, this Court has already found that HOEPA does not apply to this matter. Even if HOEPA were found to apply to this matter, Defendant does not state what information she is seeking regarding HOEPA and how that information is relevant to HOEPA's statutory provisions and this case. Defendant merely attaches an "Exhibit C" that lists litigation from other cases involving

Wells Fargo just for the proposition that those cases "raise[] questions as to whether Plaintiff has fully complied with the law." Defendant's Answer to Plaintiff's Motion for Summary Judgment, Paragraphs 37-57, Exhibit C. Therefore, since Defendant has not supplied a meaningful argument explaining the need for any further discovery, this Court does not find that discovery matters prevent this Court from entering summary judgment. See Reeves, 866 A.2d at 1124; PA. R. CIV. P. 1035.2; and Miller, 753 A.2d at 833.

CONCLUSION

Since Defendant admits her default and has no cognizable defense, the Plaintiff is entitled to summary judgment. In addition, Defendant's counterclaims do not survive summary judgment for the reasons discussed above.

ORDER OF COURT

NOW THIS 18th day of August, 2015, upon review and consideration of Plaintiff's *Motion for Summary Judgment* and Brief in Support thereof, Defendant's *Answer to Plaintiff's Motion for Summary Judgment* and Brief in Support thereof, Plaintiff's *Reply Brief in Support of Plaintiff's Motion for Summary Judgment*, the record in this case, and the applicable law;

AND WHEREAS the Parties agreed to have Plaintiff's *Motion* decided on the briefs alone;

IT IS HEREBY ORDERED that Plaintiff's *Motion for Summary Judgment* is **GRANTED** as follows:

1. With regard to Count 1 of Plaintiff's Complaint, Breach of Contract, Judgment is entered in favor of Plaintiff.

2. Based on Plaintiff's request in its *Motion for Summary Judgment*, Counts 2 and 3, Quiet Title and Specific Performance are **DISMISSED WITH PREJUDICE**.

3. Defendant's Counterclaims regarding RESPA violations, HOEPA violations, and predatory lending are **DISMISSED WITH PREJUDICE**.

Pursuant to the requirements of Pa.R.C.P. 236 (a)(2),(b) and (d), the Prothonotary shall give written notice of the entry of this Order of Court, including a copy of this Order of Court, to each party's attorney of record and shall note in the docket the giving of such notice and the time and manner thereof.