

Prepared by the Court

MS Services, LLC,
as Assignee of Bank of the West

Plaintiffs,

v.

Pasquale Calabria,
Defendants,

AND

Pasquale Calabria,

Third-Party Plaintiff,

v.

Bank of the West, Dan Price,
John Does 1-20
and ABC Companies 1-20

Third-Party Defendants.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION
OCEAN COUNTY

CIVIL ACTION

DOCKET # OCN-L-102-17

OPINION OF THE COURT

This matter comes before the Court by way of Plaintiff's and Third Party Defendants' motions to dismiss Defendant/Third-Party Plaintiff, Pasquale Calabria's, Counterclaim and Third-Party Complaint. After listening to the testimony given at oral argument, reviewing the exhibits and all papers presented to the Court, the Court hereby issues the following decision on this **12th** Day of **March 2021**:

Factual Background

This matter arises out of the Defendant, Pasquale Calabria's ("Calabria"), purchase of a yacht in 2005. Defendant Calabria financed this purchase through Essex Credit Corporation ("ECC"), which later merged with Bank of the West ("BOTW"). To purchase the yacht, Defendant Calabria financed \$250,000 of the purchase price through a loan from ECC. The loan documents included a Promissory Note and Security Agreement, which were signed by the Defendant on June 23, 2005. As further security for the loan, on June 23, 2005, Mr. Calabria executed and delivered a Preferred Ship Mortgage ("Ship Mortgage") to ECC.. ECC maintained a security interest in the yacht purchased by the Defendant pursuant to the Security Agreement that accompanied the loan. The Ship Mortgage identified the boat as collateral and contained the same

default provisions as the Security Agreement

In 2014, the Defendant's yacht was stored at PH Marina in Key Largo, Florida. Storage and docking fees were not timely paid by the Defendant, which resulted in PH Marina moving to sell the yacht based on the lien it held. BOTW was notified that PH Marina was attempting to recover the unpaid storage and dock fees incurred by the Defendant.

Upon notice from PH Marina, BOTW contacted the Defendant numerous times regarding the unpaid storage and dock fees and moved to repossess the boat. BOTW contacted the Defendant by phone but was unable to leave voicemails due to the Defendant's full voicemail inbox. On November 21, 2014, BOTW mailed a letter to the Defendant, at his Brielle, New Jersey address, stating its intention to repossess the yacht based on the unpaid marina fees. BOTW paid the unpaid storage fees in the amount of \$6,980.56 to PH Marina in order to repossess the boat. BOTW repossessed the Defendant's yacht on December 5, 2014.

The yacht was ultimately sold by BOTW for \$146,000 at auction on April 8, 2015. A demand for payment was sent to Defendant by BOTW, as well as a deficiency notice setting forth the interest that had accrued and the rate it would continue to accrue at after the deficiency notice was sent.

On October 20, 2015 BOTW entered into a service agreement and assigned the Defendant's account to MS Services LLC ("MS Services") for collection. MS Services, an assignee of BOTW, has continued to demand payment from the Defendant.

Procedural Background

Defendant Pasquale Calabria, "Calabria", filed an Amended Counterclaim against the Plaintiff, MS Services, LLC, Assignee of the Bank of the West, "MS Services", alleging Wrongful Repossession; Violation of the New Jersey Consumer Fraud Act; and Civil Conspiracy. Plaintiff, MS Services, filed a motion to dismiss each count of Defendant's counterclaim alleging each count fails to state a claim upon which relief can be granted. Third-Party Plaintiff, Pasquale Calabria, "Calabria", filed an Amended Third-Party Complaint against the Third-Party Defendant, Dan Price, alleging Civil Conspiracy. Third-Party Defendant, Dan Price filed a motion to dismiss the Civil Conspiracy count alleging it fails to state a claim upon which relief can be granted. Third-Party Plaintiff, Calabria, filed an Amended Third-Party Complaint against the Third-Party Defendant, Bank of the West, "BOTW", alleging Breach of Contract; Breach of Implied Covenant of Good Faith and Fair Dealing; Wrongful Repossession; Violation of the New Jersey Consumer Fraud Act; Civil Conspiracy and Conversion. Third-Party Defendant BOTW filed a motion to dismiss each count of the Third-Party Complaint alleging each count fails to state a claim upon which relief can be granted.

Defendant Calabria's Amended Counterclaim alleging Wrongful Repossession is Dismissed

A motion to dismiss a pleading for failure to state a claim upon which relief can be granted is governed by Rule 4:6-2(e). The threshold of the motion is “whether a cause of action is ‘suggested’ by the facts.” Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739,746 (1987), citing Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988). Such an “inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint.” Printing Mart- Morristown, at 189, citing Rieder v. Dept. of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). The court is to “search[] the complaint in depth and with great liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim.” Id., quoting Di Cristofaro v. Laurel Grove Memorial Park, 43 N.J. Super. 244, 252 (App. Div. 1957). Moreover, “Plaintiffs are entitled to every reasonable inference of fact.” Id., citing Independent Dairy Workers Union v. Milk Drivers Local 680, 23 N.J. 85, 89 (1956). This Court hereby determines that the Wrongful Repossession count filed against MS Services should be dismissed. As defendant, Calabria, may not bring an affirmative action against the assignee, MS Services, for which a claim has been properly laid against the assignor, Bank of the West. Pargman v. Maguth, 2 N.J. Super. 33, 38 (App. Div. 1949).

Defendant Calabria’s Amended Counterclaim alleging New Jersey Consumer Fraud Act Violations is Dismissed

Defendant Calabria claims that MS Services violated the New Jersey Consumer Fraud Act. To set forth a prima facie case under the New Jersey Consumer Fraud Act, a plaintiff must prove the following three elements: 1) unlawful conduct by the defendant; 2) an ascertainable loss by the plaintiff; and 3) a causal relationship between the unlawful conduct and the ascertainable loss. D’Agostino v. Maldonado, 216 N.J. 168 (2013). Here the counterclaimant, Calabria seeks to advance a Consumer Fraud Act claim that centers upon the sale of the boat and sale of his personal possessions contained upon or within the boat. The terms of repossession and sale of the boat are set forth in the financing contract executed by Mr. Calabria. The plaintiff asserts that the repossession was required in order to preserve the asset. Pasqual Calabria failed to pay five months of storage fees at the marina where the boat was located. Any deviation in the repossession process which was instituted by the finance company is an alleged breach of contract, not a separate and distinct tort. The counts sounding in tort derive exclusively from the allegations and facts underlying the breach of contract claim, and thus should not be considered separate claims for statute of limitation purposes. Custom Communications Engineering Inc. v. E.F. Johnson Co., 269NJ Super 531 (App.Div. 1993), See Foodtown v. Sigma Marketing Sys., Inc., 518 F.Supp. 485, 489 (D.N.J.1980) (plaintiff’s allegations of fraud and tortious misrepresentation were nothing more than a “dress up” of its contract claim, and thus were barred by § 2-725(1)). Compare Triangle Underwriters, Inc. v. Honeywell, Inc., 604 F.2d 737, 747-48 (2d Cir.1979) (plaintiff’s fraud claim is subject to six-year statute of limitations, rather than §

2-725(1) because claim consisted of an independent false representation made in the inducement before creation of the contract). The court in *Triangle, Id.* and *D'Angelo v Miller Yacht Sales*, 261 N.J. Super. 683 (App. Div. 1993) is careful to explain the survival of the Consumer Fraud Act claim against the seller/lender vaults the U.C.C. four year statute of limitations because the fraud perpetrated against the purchaser was a fraud in the inducement to purchase. The fraud survives because the fraud preceded the execution of the U.C.C. sales/financing documents. The courts in New Jersey will permit a Consumer Fraud Act count to survive a U.C.C. statute of limitations when the fraud occurs prior to commencement of the parties relationship under the contract sought to be enforced through the U.C.C. A transaction should not be removed from the ambit of the UCC to the area of tortious conduct simply by making general allegations of fraud: otherwise the form of the pleading could negate the purpose and force of § 2-725. See *Closed Circuit Corp. of Am. v. Jerrold Electronics Corp.*, 426 F.Supp. 361, 364 (E.D.Pa.1977).

Calabria's counter-claim seeks recovery from MS Services for economic loss for a breach of a financing contract. As our Supreme Court has held, "a commercial buyer seeking damages for economic loss only should proceed under the U.C.C. against parties in the chain of distribution." *Spring Motors Distribs.*, 98 N.J. at 578, 489 A.2d 660. Thus, "the weight of authority supports the proposition that economic expectations that are protected by the U.C.C. are not entitled to supplemental protection by negligence principles." *Id.* at 581, 489 A.2d 660. Consequently, Calabria's tort claims against MS Services are time-barred.

The court takes notice of Calabria's assertion that the U.C.C. carves out an exception for Consumer Fraud Act claims to its own statute of limitation provisions. While the UCC provides the exclusive remedy to a consumer-buyer for the direct economic loss arising from a breach of warranty, the UCC (*N.J.S.A. 12A:1-203*) expressly preserves a consumer-buyer's common-law fraud and Consumer Fraud Act (*N.J.S.A. 56:8-1* to -14) claims arising from a sales transaction. Such fraud claims are governed by the six-year statute of limitations under *N.J.S.A. 2A:14-1*, rather than the four-year limitation period of the UCC. *D'Angelo*, 261 N.J. Super. at 688, 619 A.2d 689. However, *D'Angelo* involved a claim that the merchant "willfully and with malice" misrepresented a yacht as new. *Id.* at 686, 619 A.2d 689. No such fraud claim is asserted here. At best the claims of Calabria can be characterized as violation of contract terms established for the repossession and sale of the boat upon default by the borrower.

Under paragraph forty eight of Calabria's November 10, 2019 counterclaim, the alleged violations of the Consumer Fraud Act are:

- a) repossessing of the Voyager, despite Calabria being current on all payments;
- b) failing to sell the Voyager in commercially reasonable manner; and

- c) misrepresenting the proceeds of the disposition of the Voyager;

The conduct described in the counterclaim is conduct regulated and defined by the terms of the financing agreement. Calabria has alleged three separate violations of the Consumer Fraud Act; all three allegations describe conduct which falls within the four corners of the terms and conditions of the financing agreement. Accordingly the four year statute of limitations set forth in the U.C.C. controls this conduct.

The claim of Consumer Fraud must be dismissed because it has no legal or factual basis. By the express terms of the parties' agreement, the lender had the right to repossess upon default. Any personal property of the borrower contained on the boat after notice of sale is subject to sale by the lender. Where, as here, the right repossess the boat is absolute under the wording in an agreement, the motive of a party in terminating such an agreement is irrelevant to the question of whether the termination is effective." *Karl's Sales and Service, Inc. v. Gimbel Brothers, Inc.*, 249 N.J.Super. 487, 495, 592 A.2d 647 (App.Div.), *certif. denied*, 127 N.J. 548, 606 A.2d 362 (1991).

Calabria is unable to demonstrate an ascertainable loss from the repossession of the boat because MS Services was not involved with Calabria until years after he purchased the boat. Additionally, a plaintiff may not claim counsel fees as his ascertainable loss under the New Jersey Consumer Fraud Act. For these reasons, this Court hereby dismisses Calabria's Consumer Fraud claim against MS Services.

Defendant Calabria's Amended Counterclaim and Third-Party claim alleging Civil Conspiracy against MS Services and Dan Price, respectively, are Dismissed

As to Calabria's Civil Conspiracy claim against MS Services, the claim is inappropriate as it seeks affirmative relief in violation of N.J.S.A. 12A:9-404. Additionally, Calabria must establish an actionable underlying tort which the defendants agreed to perpetrate, and which was committed. Landriani v. Lake Mokawk Country Club, 26 N.J. Super. 157 (App. Div. 1953). As mentioned previously in this opinion, this Court is not persuaded that Calabria has set forth a prima facie case for any of the underlying torts.

Mr. Calabria filed a Third-Party claim against Dan Price for Civil Conspiracy. Mr. Price denies the claim upon N.J.S.A. 42:2C-30. That statute provides that the debts, obligations, or other liabilities of a limited liability company do not become the debts, obligations, or other liabilities of a manager solely by reason of that manager acting as a manager. There is no evidence that Mr. Price made any representations, statements, certifications, declarations, or other communications in his individual capacity. As a result, this Court finds that the Calabria's complaint against Price for Civil Conspiracy must be dismissed.

The 2005 Loan Transaction

This Court makes the following findings with respect to the 2005 Loan Transaction between Mr.

Calabria and BOTW. N.J.S.A. 12A:2-102 provides that “[u]nless the context otherwise requires, this Chapter applies to transaction in goods.” “Goods” are defined as “all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale, other than which the money in which the price is to be paid. . . .” N.J.S.A. 12A:2-105(1). A “buyer” is defined as “a person who buys or contracts to buy goods.” N.J.S.A. 12A:2-103(1)(a). A “sale” involves “the passing of title from the seller to the buyer for a price.” N.J.S.A. 12A:2-106(1). Calabria’s contract to purchase the boat and the purchase money financing that he obtained from BOTW constitutes a contract for the sale of goods within N.J.S.A. 12A:2-102, et. seq. As a result, this Court finds that the loan transaction between BOTW and Calabria that transpired on June 23, 2005, and is governed by the UCC.

The Court’s Consideration of the Applicable Statute of Limitations

This Court makes the following findings as to the applicable statute of limitations. The 4-year statute of limitations set forth in N.J.S.A. 2A:2-725(1) governs claims for breach of contract regarding the sale of goods. The cause of action accrues “when the breach occurs, regardless of the aggrieved party’s lack of knowledge of the breach.” N.J.S.A. 2A:2-275(2). “A cause of action for breach of contract accrues the moment the right to commence an actions comes into existence, and occurs when one party has, by words or conduct, indicated to the other that the agreement in being repudiated or breached.” N.J. Div. of Taxation v. Selective Ins. Co. of Am., 399 N.J. Super. 315, 326 (App. Div. 2008). The 6-year statute of limitations provided in N.J.S.A. 2A:14-1 does not apply to UCC contractual breaches. The last sentence of N.J.S.A. 2A:14-1 provides, “This section shall not apply to any action for breach of any contract for sale governed by sections 12A:2-725 of the New Jersey Statutes.” Accordingly, the Consumer Security Agreement and Ship Mortgage are governed by the 4-year statute of limitations under N.J.S.A. 12A:2-725(1). Count 3 of Calabria’s Third-Party Complaint confirms this. Deficiency claims, such as the claims against Calabria in the instant case, are governed by the same UCC 4-year statute of limitations. Assoc. Discount Corp. v. Palmer, 47 N.J. 183, 187 (1966); Ford Motor Credit Co. v. Arce, 348 N.J. Super. 198 (2002).

This Court makes the following determination as to the triggering dates of the 4-year statute of limitations. Pursuant to N.J.S.A. 12A:2-725(2), December 5, 2014 is a triggering date for the accrual of Mr. Calabria’s claim against BOTW for wrongfully repossession of the boat. The last day for Mr. Calabria to file a wrongful repossession claim against BOTW under the 4-year statute of limitations was December 5, 2018. This Court also finds that pursuant to N.J.S.A. 12A:2-725(2), April 8, 2015 is a triggering date for the accrual of Mr. Calabria’s claim against BOTW for wrongful sale of the boat. The last day for Mr. Calabria to file a wrongful sale claim against BOTW under the 4-year statute of limitations was April 8, 2019. The UCC 4-year statute of limitations on Mr. Calabria’s claims against BOTW already expired when he filed his motion to vacate default judgment on July 11, 2019. Mr. Calabria’s Third-Party Complaint

against BOTW was filed on September 8, 2020, significantly past the UCC 4-year statute of limitations period applicable to the triggering dates of December 5, 2014 and April 8, 2015.

With respect to Mr. Calabria's tort claims, this Court makes the following findings. The tort claims are inextricably intertwined with Mr. Calabria's breach of contract claims; therefore, the UCC 4-year statute of limitations bars the tort claims. Custom Com. Eng. V. E.F. Johnson, 269 N.J. Super. 531, 541 (App. Div. 1983); Foodtown v. Sigma Marketing Sys., Inc., 518 F.Supp. 485, 489 (D.N.J. 1980). Mr. Calabria's claim that BOTW converted his personal property (Count VII) falls within paragraph 8(B) of the Consumer Security Agreement, to wit: "If the property contains any goods not covered by this Agreement at the time of repossession, I agree that Lender may take such goods, provided that Lender makes reasonable efforts to return them to me after repossession." The parties' contract contemplated the exact scenario that Mr. Calabria now complains about, thus his conversion claim is barred by the 4-year statute limitations set forth in N.J.S.A. 12A:2-725(2). Since Mr. Calabria concedes that the Consumer Security Agreement constitutes a UCC transactions, he was required to file his conversion claims predicated on BOTW's alleged breach of paragraph 8(B) thereof within 4-years of the accrual per N.J.S.A. 12A:2-725(1). He did not. This Court is also persuaded that Mr. Calabria has not asserted any equitable tolling of the 4-year statute of limitations, and the record contains no evidence to apply equitable tolling.

Mr. Calabria admits in Count 3 of his Third-Party Complaint that the Consumer Security Agreement constitutes a contract for the sale of goods under the UCC. The admission with all other statements set forth in Mr. Calabria's Third Party Complaint constitute binding judicial admissions. This Court makes the following findings as to Calabria's Claim for Breach of the Implied Covenant of Good Faith. As Mr. Calabria's breach of contract claims are barred by the 4-year statute of limitations found in N.J.S.A. 12A:2-725(1), the duplicative claim for breach of the implied covenant of good faith and fair dealing is also time barred under N.J.S.A. 12A:2-725(1). The UCC imposes an obligation of good faith. N.J.S.A. 12A:1-304. Moreover, the implied covenant of good faith cannot "alter the terms of a written agreement" and may not "preclude a creditor from exercising its bargained-for rights under a loan agreement." Glenfed Fin. Corp., Commercial Fin. Div. v. Penick Corp., 276 N.J. Super. 163, 175 (App. Div. 1994) (citations omitted), certif. den. 139 N.J. 442 (1995).

As to Calabria's Conspiracy claim against BOTW, this Court finds that Calabria must establish an actionable underlying tort which the defendants agreed to perpetrate, and which was committed. Landriani v. Lake Mokawk Country Club, 26 N.J. Super. 157 (App. Div. 1953). As mentioned previously in this opinion, this Court is not persuaded that Calabria has set forth a prima facie case for any of the underlying torts. Moreover, this Court finds that Mr. Calabria defaulted on his loan agreement which prompted BOTW to exercise its contractual rights as a secured creditor to repossess and sell its collateral. BOTW made

numerous attempts verbally and in writing to contact Mr. Calabria to prevent the repossession of his boat. Unfortunately, Mr. Calabria did not take advantage of BOTW's attempts to work with him. As a result, this Court finds that BOTW did not violate the contract with Mr. Calabria.

With respect to Mr. Calabria's Consumer Fraud Act claim, this Court finds that the allegations supporting his Consumer Fraud Act claim are repeated verbatim from Court II (breach of implied covenant of good faith and fair dealing) and Court III (wrongful repossession) of the Third Party Complaint. When the alleged misconduct supporting the Consumer Fraud Act claim relates to an underlying contract, as it does here, this Court may dismiss a Consumer Fraud Act claim that is related to the contract by applying the statute of limitations for breach of contract, which in this case is 4-years. Custom Com. Eng. v. E.F. Johnson, 269 N.J. Super. 531, 540-542 (App. Div. 1993). Additionally, this Court finds that D'Angelo v. Miller Yacht Sales, 261 N.J. Super. 683 (App. Div. 1993) is inapplicable here. That case concerned fraud which occurred at the inception of the contract where the merchant was accused of deliberately misrepresenting a used and defective yacht as being new. Id., at 686. Calabria does not allege fraud at the inception of the loan with BOTW. As a result, the 4-year statute of limitations applies and bars the Consumer Fraud Act claim. Finally, this Court finds that the Third Party Complaint does not plead a cause of action predicated on fraud on the Court.

For the reasons expressed above, this Court finds by a preponderance of the evidence that the R.4:6-2(e) motions to dismiss filed by MS Services, Mr. Price and BOTW against Calabria should be granted. As a result, it is hereby Ordered that the counterclaim filed by Calabria against MS Services is dismissed with prejudice; that the Third-Party Complaint filed by Calabria against Mr. Price is dismissed with prejudice; and that the Third-Party Complaint filed by Calabria against BOTW is dismissed with prejudice.

It is FURTHER ORDERED that a copy of this order shall be served upon all parties within seven (7) days.

WRITTEN DECISION RENDERED
March 12, 2021

s/ Craig L. Wellerson
HON. CRAIG L. WELLERSON, PJ.CV.