

CAUSE NO. _____

DIANE LOPEZ

v.

THE BANK OF NEW YORK MELLON

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

_____ JUDICIAL DISTRICT

**PLAINTIFF'S ORIGINAL PETITION, APPLICATION FOR INJUNCTIVE RELIEF,
AND REQUEST FOR DISCLOSURES**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Diane Lopez, Plaintiff herein, filing this her Original Petition, Application for Injunctive Relief, and Request for Disclosures complaining of The Bank of New York Mellon, Defendant herein, and for causes of action would respectfully show the Court as follows:

DISCOVERY

1. Plaintiff intends to conduct discovery under Texas Rules of Civil Procedure 190.3 (Level 2).

PARTIES

2. Diane Lopez is an individual who resides in Harris County, Texas and may be served with process on the undersigned legal counsel.
3. The Bank of New York Mellon is an entity formed under the laws of the state of New York which may be served with process as follows:

The Bank of New York Mellon
c/o Branch Manager or Corporate Officer
3210 BNY Mellon Center
Pittsburgh, PA 15258-0001

JURISDICTION AND VENUE

4. The Court has jurisdiction over The Bank of New York Mellon because the Defendant is an entity formed under the laws of the State of New York which conducts business in Harris County, Texas.

5. The Court has jurisdiction over the controversy because the damages are within the jurisdictional limits of the Court. Venue is mandatory in Harris County, Texas because the subject matter of this lawsuit involves real property which is located in Harris County, Texas. Further, all or a substantial part of the events or omissions giving rise to Plaintiff's causes of action occurred in Harris County, Texas thus venue is proper under §15.002(a)(1) of the Texas Civil Practice and Remedies Code.

RELEVANT FACTS

6. The subject matter of this lawsuit is the real property and the improvements thereon located at 1011 Klamath Lane, Houston, TX 77090 (the "Property").

7. Diane Lopez ("Lopez") and her husband purchased the Property on or about December 15, 2006. During the process of purchasing the Property, Lopez executed a Note in the amount of \$190,750.00 as well as a Deed of Trust in which Countrywide Home Loans, Inc. is listed as the Lender. A true and correct copy of the Deed of Trust is attached hereto as Exhibit "1" and incorporated herein for all purposes.

8. Upon information and belief, the Note and related Deed of Trust were subsequently transferred to The Bank of New York Mellon ("BONY") for which Specialized Loan Servicing, LLC acts as the loan servicer.

9. Due to the COVID-19 pandemic, Plaintiff contacted Defendant to accept the forbearance plan she was offered. Defendant's representative assured her that after the forbearance period ended, they would attach the arrearages to the end of the note and extend the loan out by the number of months in the forbearance.

10. Once the forbearance period had ended, Plaintiff contacted Defendant to make sure that the arrearages would be moved to the back of the loan as had been previously promised. However, Plaintiff was then told that this was not an automatic change and that she would have to fill out a loan modification application.

11. Defendant then denied Plaintiff's modification application with the only reason given was "that her arrearages were too much to be put at the back end of the note and that they needed to be paid in one-lump sum or that BONY would initiate the foreclosure process. and then proceeded to post the Property for foreclosure sale.

12. Lopez then received various notices telling her that she was in default and that they would be foreclosing on her home. Lopez tried to reach out to BONY but they refused to work with her. A true and correct copy of Notice of Acceleration and Notice of Trustee's Sale, which was provided to Plaintiff by the undersigned legal counsel, is attached hereto as Exhibit "2" and incorporated herein for all purposes.

13. Accordingly, Plaintiff alleges that BONY is about to wrongfully sell her Property at a foreclosure sale on March 1, 2022 after inducing her into a forbearance plan with the intent to eventually foreclose on her.

CLAIMS
AGENCY & RESPONDEAT SUPERIOR

14. Wherever it is alleged that Defendant did anything, or failed to do anything, it is meant that such conduct was done by Defendant's employees, principals, agents, attorneys, and/or affiliated entities, in the normal or routine scope of their authority, or ratified by Defendant, or done with such apparent authority so as to cause Plaintiff to reasonably rely that such conduct was within the scope of their authority. Plaintiff did rely to Plaintiff's detriment on Defendant's representatives being vested with authority for their conduct. Defendant is vicariously liable for the conduct of their employees, principals, agents, attorneys, affiliated entities, and representatives of Defendant's affiliated entities by virtue of respondent superior, apparent authority, and estoppel doctrines.

FIRST CAUSE OF ACTION:
BREACH OF COMMON LAW TORT OF UNREASONABLE COLLECTION EFFORTS

15. To the extent not inconsistent herewith, Plaintiff incorporates by reference the allegations made in paragraphs 1 through 14 as if set forth fully herein.

16. This is a cause of action for the commission of unreasonable collection efforts in violation of the common law of the State of Texas.

17. As stated above, Defendant's course of conduct of trying to collect a debt without any authority under the Deed of Trust amounts to an unreasonable collection effort. Moreover, Defendant failed to give Plaintiff a chance to reinstate or cure the default and intentionally misled and delayed Plaintiff to the point of foreclosure. While all along, Defendant continued to assess late charges and penalties, improperly placed the Property in foreclosure, and imposed numerous additional charges upon the Plaintiff's mortgage account, thus using a deceptive means to collect a debt. By such actions and course of conduct, the Defendant has slandered Plaintiff's credit

reputation, defamed her credit and exposed her family to ridicule in the community, thereby causing them further economic damages. Additionally, as set forth herein, Plaintiff has suffered extreme and severe mental anguish and emotional distress resulting in loss of income and mental suffering.

18. Such acts and practices of the Defendant have been unreasonable and have violated the ordinary standard of care required of mortgage loan companies, which breach of duty has proximately caused damages to Plaintiff exceeding the minimum jurisdictional limits of this Court. Employee Finance Co v. Lathram, 363 S.W.2d 899 (Tex. Civ. App. – Fort Worth 1962), aff'd in part, rev'd in part on other grounds, 369 S.W.2d 927 (Tex. 1963); Ware v. Packston, 359 S.W.2d 897 (Tex. 1962). See also Tex. Jur. Collections Section 10. Plaintiff therefore seeks recovery of all actual damages proximately caused by such violations of law, including but not limited to recovery of all actual damages sustained, all actual direct and indirect economic damages, including but not limited to damages for loss of credit and damages to credit reputation, and mental anguish and emotional distress, any consequential damages, and punitive damages all in amounts exceeding the minimum jurisdictional limits of this Court.

**SECOND CAUSE OF ACTION:
PROMISSORY ESTOPPEL**

19. To the extent not inconsistent herewith, Plaintiff incorporates by reference the allegations made in paragraphs 1 through 18 as if set forth fully herein.

20. The actions committed by Defendant constitute promissory estoppel because:

- A. Defendant made a promise to Plaintiff to move the arrearages created from the COVID-19 forbearance to the back of the note.
- B. Plaintiff reasonably and substantially relied on the promise to her detriment.

**THIRD CAUSE OF ACTION:
FRAUD IN THE INDUCEMENT**

21. To the extent not inconsistent herewith, Plaintiff incorporates by reference the allegations made in paragraphs 1 through 20 as if set forth fully herein.

22. Plaintiff shows that Defendant made material, false representations to Plaintiff with the knowledge of their falsity or with reckless disregard of the truth with the intention that such representations be acted upon by Plaintiff and that Plaintiff relied on these representations to his detriment.

23. Plaintiff would further show that Defendant concealed or failed to disclose material facts within the knowledge of Defendant, that Defendant knew that Plaintiff did not have knowledge of the same and did not have equal opportunity to discover the truth, and that Defendant intended to induce Plaintiff to enter into multiple transactions which made the basis of this suit by such concealment or failure to disclose.

24. Defendant used deceit or trickery to induce Plaintiff to act to his disadvantage, by causing him to enter into a forbearance but failed to disclose that once the forbearance was up all months that had been part of the forbearance would need to be paid in one lump sum. But for the deceit and trickery of Defendant, Plaintiff would not have entered into said forbearance agreement. The deceit and trickery used by Defendant, when made, was known to contain false and misleading representations or were recklessly asserted by Defendant without any knowledge of truth. Furthermore, Defendant was aware, or should have been aware, of Plaintiff's lack of sophistication with financial and/or real estate transactions.

25. A confidential or "informal fiduciary" relationship existed between the parties. Defendant had a duty to disclose these facts to Plaintiff and was deliberately silent when Defendant had a duty to speak.

26. Defendant used such trickery and deceit and false representations with the intent that Plaintiff would default on her loan and would be unable to become current.

27. Plaintiff acted in reliance on the misrepresentations and the reliance on such misrepresentations were justifiable and reasonable.

28. Furthermore, Defendant knew Plaintiff was ignorant of the nondisclosed facts and lacked opportunity to discover the truth.

29. As a result of the unconscionable actions and intentional nondisclosure of Defendant set out above, Plaintiff was harmed, and should be allowed recovery of her actual damages. In order to fully compensate Plaintiff, equitable relief in the form of rescission is also proper. The actions of the Defendant also warrant exemplary damages to deter such conduct in the future.

**FOURTH CAUSE OF ACTION:
BREACH OF CONTRACT**

30. To the extent not inconsistent herewith, Plaintiff incorporates by reference the allegations made in paragraphs 1 through 29 as if set forth fully herein.

31. The actions committed by Defendant constitutes breach of contract because:

- A. There exists a valid, enforceable contract (in addition to the Deed of Trust) between Plaintiff and Defendant whereby Defendant agreed to provide a modification to the Note after the forbearance had ended;
- B. Plaintiff has standing to sue for breach of contract;
- C. Plaintiff performed her contractual obligations under the Deed of Trust;

- D. Defendant breached the parties' agreement by not providing a modification; and
- E. The breaches of contract by Defendant caused Plaintiff's injury – actual damages which include, but are not limited to, loss of alternative loss mitigation options, violating Plaintiff's due process rights, litigation cost, interest on the balance of unpaid mortgage payments since the filing of this lawsuit, damage to Plaintiff's credit, and numerous erroneous expenses, overcharges, and penalties.

DAMAGES:
ACTUAL DAMAGES

32. Plaintiff is entitled to recover her actual damages from Defendant for which Plaintiff pleads in an amount which does not exceed the jurisdictional limits of this Court.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

33. Plaintiff endured stress, anxiety, and loss of sleep as a result of Defendant's misconduct. Accordingly, Plaintiff is entitled to recover mental anguish damages from Defendant for which she pleads in an amount which does not exceed the jurisdictional limits of this Court.

EXEMPLARY DAMAGES

34. Plaintiff is entitled to recover her exemplary damages from Defendant for which Plaintiff pleads in an amount which does not exceed the jurisdictional limits of this Court.

ATTORNEYS' FEES

35. Pursuant to Section 392.403 of the Texas Finance Code, Plaintiff is entitled to recover attorneys' fees reasonably related to the amount of work performed and costs, for all actions in the trial court, the Court of Appeals, and the Texas Supreme Court.

36. Plaintiff was forced to employ the undersigned attorneys and has agreed to pay them reasonable attorneys' fees for their services. Plaintiff is entitled to recover reasonable attorneys' fees pursuant to Chapter 38 of the Texas Civil Practices & Remedies Code for which Plaintiff pleads in an amount which does not exceed the jurisdictional limits of this Court.

CONDITIONS PRECEDENT

37. All conditions precedent to the Plaintiff's right to bring these causes of action have been performed, have occurred, or have been waived.

REQUEST FOR DISCLOSURES

38. The Bank of New York Mellon is hereby requested to disclose to Diane Lopez, within 50 days of service of this request, the information and material described in Rule 194 of the Texas Rules of Civil Procedure.

APPLICATION FOR TEMPORARY RESTRAINING ORDER

39. To the extent not inconsistent herewith, Plaintiff incorporates by reference the allegations made in paragraph 1 through paragraph 38 as if set forth fully herein.

40. Unless Defendant is enjoined, Plaintiff will suffer probable harm which is imminent and irreparable since Defendant is about to sell Plaintiff's Property at a foreclosure sale on March 1, 2022 thereby depriving Plaintiff of ownership of the Property. Further, Defendant may take legal action to evict or otherwise cause Plaintiff to be dispossessed of the Property. Plaintiff has no adequate remedy at law because the subject matter is real property and any legal remedy of which Plaintiff may avail herself will not give her as complete, equal, adequate, and final a remedy as the injunctive relief sought in this Application.

41. Therefore, Plaintiff request that this Court issue a Temporary Restraining Order and, thereafter, a Temporary Injunction, to restrain Defendant from selling the real property which is the subject matter of this lawsuit commonly known as 1011 Klamath Lane, Houston, TX 77090 as well as from taking any legal action to evict Plaintiff and any other occupants from, or enforcing a writ of possession regarding, the aforementioned property.

42. Plaintiff further requests that, upon trial on the merits, Defendant be permanently enjoined from the same acts listed in Paragraph 39 above.

43. Plaintiff is likely to prevail on the merits of the lawsuit as described above.

44. The granting of the relief requested is not inconsistent with public policy considerations.

BOND

45. Plaintiff is willing to post a reasonable temporary restraining order bond and requests that the Court set such bond.

PRAYER


WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully requests that:

- A. Defendant be cited to appear and answer herein;
- B. The Court conduct a hearing on Plaintiff's Application for Injunctive Relief;

- C. A Temporary Restraining Order be issued restraining Defendant, its agents, employees, officers, directors, shareholders, and legal counsel, and those acting in concert or participation with them who receive actual notice of the Order, by personal service or otherwise, from selling the real property which is the subject matter of this lawsuit and is commonly known as 1011 Klamath Lane, Houston, TX 77090 as well as taking any legal action to evict Plaintiff and any other occupants from, or enforcing a writ of possession regarding, the aforementioned property;
- D. A Permanent Injunction be entered enjoining Defendant from the same acts listed in Paragraph C above; and
- E. Upon final hearing or trial hereof, the Court order a judgment in favor of Diane Lopez against The Bank of New York Mellon for her actual damages, mental anguish damages, exemplary damages, reasonable attorneys' fees, all costs of court, and such other and further relief, both general and special, at law or in equity, to which Plaintiff may be entitled.

Respectfully submitted,

VILT AND ASSOCIATES -- TX, P.C.

By: 
ROBERT C. VILT
Texas Bar Number 00788586
Email: clay@viltlaw.com
5177 Richmond Avenue, Suite 1142
Houston, Texas 77056
Telephone: 713.840.7570
Facsimile: 713.877.1827
ATTORNEYS FOR PLAINTIFF