

ENTERED

September 20, 2024

Nathan Ochsner, Clerk

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

SHYSA LEWIS,	§	CIVIL ACTION NO
Plaintiff,	§	4:23-cv-00934
	§	
	§	
vs.	§	JUDGE CHARLES ESKRIDGE
	§	
	§	
WELLS FARGO BANK	§	
NA,	§	
Defendant.	§	

**ORDER AND OPINION
ON MOTION FOR SUMMARY JUDGEMENT**

The motion by Defendant Wells Fargo Bank, NA, for summary judgment is granted in part and denied in part. Dkt 27. The claim for violation of the Real Estate Settlement Procedures Act is dismissed with prejudice. The claim as to breach of contract will proceed to trial.

1. Background

Plaintiff Shysa Lewis obtained a loan, which was ultimately transferred to Wells Fargo. She fell behind on her loan payments. See Dkt 27-1 at 4.

In May 2019, Wells Fargo offered Lewis what it calls a *Flex Modification Trial Plan* to provide a “temporary payment relief period that allows you to demonstrate that you can consistently manage the estimated modified mortgage payment.” Id at 37. The plan required her to make three monthly payments. See id at 32. Lewis failed to make the payments, and so Wells Fargo removed her from the program. See id at 4.

In February 2020, Wells Fargo again offered Lewis the chance to participate in this program. She failed to make

the payments, and Wells Fargo again removed her from the program for lack of compliance. See *id.* at 4–5.

In May 2021, Wells Fargo offered Lewis a third chance to participate in this program. This plan required her to make three monthly payments in the amount of \$3,472.13. See *id.* at 5. The offer stated: “If you follow the terms of the trial period plan, your mortgage will be permanently modified. . . . If you do not contact [Wells Fargo] or send your first trial period plan payment by June 1, 2021, foreclosure proceedings may be started or continue.” *Id.* at 32. This included three steps. First, the plan said Lewis “**must do one of these**” by June 1, 2021: “Contact us by phone or in writing to let us know if you intend to accept this offer . . . **OR** Send your first trial period plan payment of **\$3,742.13** to accept this offer.” *Id.* at 34 (capitalization and emphasis original). Second, she would then be required to make the three monthly “**trial period plan payments**” of \$3,472.13. *Id.* at 34–35 (emphasis original). Third, she needed to sign and return a loan modification agreement, “which we will send you near the completions of the trial period plan.” *Id.* at 35.

On May 29, 2021, Lewis emailed Wells Fargo “to confirm acceptance of the offer.” *Id.* at 46. Three days later, she transferred the first payment in the amount of \$3,471.13, which was one dollar short of the required amount. See Dkt 31-6. She then paid the remaining two monthly payments in the full amount of \$3,472.16. See Dkts 31-7 & 31-8.

On August 5, 2021, Wells Fargo notified Lewis by letter that she had been removed from the mortgage assistance review process because she “did not accept by satisfying the requirements of the trial offer” Dkt 27-1 at 5.

The live pleading is the first amended complaint, which asserts causes of action for breach of contract (with alternative request for specific performance) and violation of the Real Estate Settlement Procedures Act. Dkt 21 at ¶¶10–27. Pending is a motion for summary judgment by Wells Fargo. Dkt 27.

2. Legal standard

Rule 56(a) of the Federal Rules of Civil Procedure requires a court to enter summary judgment when the movant establishes that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” The Fifth Circuit holds that a fact is *material* if its resolution in favor of one party might affect the outcome of the lawsuit under governing law. *Sossamon v Lone Star State of Texas*, 560 F3d 316, 326 (5th Cir 2009) (citations omitted). And it holds that a *genuine dispute of material fact* exists “when the ‘evidence is such that a reasonable jury could return a verdict for the nonmoving party.’” *Nola Spice Designs LLC v Haydel Enterprises Inc*, 783 F3d 527, 536 (5th Cir 2015), quoting *Anderson v Liberty Lobby Inc*, 477 US 242, 248 (1986).

A court reviewing a motion for summary judgment must draw all reasonable inferences in the light most favorable to the nonmoving party. *Connors v Graves*, 538 F3d 373, 376 (5th Cir 2008). The moving party typically bears the entire burden to demonstrate the absence of a genuine issue of material fact. *Nola Spice*, 783 F3d at 536 (citation omitted); see also *Celotex Corp v Catrett*, 477 US 317, 323 (1986). But when a motion for summary judgment by a defendant presents a question on which the plaintiff bears the burden of proof at trial, the burden shifts to the plaintiff to proffer summary judgment proof establishing an issue of material fact warranting trial. *Nola Spice*, 783 F3d at 536 (citations omitted). To meet this burden of proof, the evidence must be both competent and admissible at trial. *Bellard v Gautreaux*, 675 F3d 454, 460 (5th Cir 2012) (citations omitted).

3. Analysis

Lewis failed in her response to defend her claim under the Real Estate Settlement Procedures Act, thus abandoning it. That claim will be dismissed. But the claim for breach of contract will proceed.

a. Real Estate Settlement Procedures Act

The relevant implementing regulation under RESPA is what's known as Regulation X. Among other things, it requires loan servicers to provide borrowers specific notice of the reasons for denial of a loan mitigation application. See 12 CFR §1024.41(d) (detailing denial requirements).

Lewis alleges that Wells Fargo violated the regulation when it didn't "specifically list the reasons as to Plaintiff's denial of a permanent loan modification because it incorrectly stated that Plaintiff did not accept the TPP." Dkt 21 at ¶22. Wells Fargo contends that "(1) RESPA only applies to an initial loss mitigation application . . . (2) there was no 'denial' of the application—Plaintiff instead approved and failed to perform all conditions, and (3) Wells Fargo gave Plaintiff a reasonable time to satisfy her requirements under the TPP offer and provided Plaintiff with the specific denial reason in August 2021." See Dkt 27 at 2.

Lewis didn't respond in defense of her RESPA claim. See Dkt 31. It is thus treated as abandoned. See *Terry Black's Barbeque, LLC v State Automobile Mutual Insurance Company*, 22 F4th 450, 459 (5th Cir 2022); *In re Dallas Roadster, Ltd*, 846 F3d 112, 126 (5th Cir 2017).

Summary judgment will enter in favor of Wells Fargo as to the RESPA claim.

b. Breach of contract

"In Texas, '[t]he essential elements of a breach of contract action are: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained by the plaintiff as a result of the breach.'" *Smith International, Inc v Egle Group, LLC*, 490 F3d 380, 387 (5th Cir 2007), quoting *Valero Marketing & Supply Co v Kalama International, LLC*, 51 SW3d 345, 351 (Tex App 2001). An essential element of a valid, enforceable contract is thus "execution and delivery of the contract with intent that it be mutual and binding." *Huckaba v Ref-Chem, LP*, 892 F3d 686, 689 (5th Cir 2018).

Wells Fargo brings challenge as to the elements of *acceptance*, *performance*, and *damages*. None support summary judgment.

As to acceptance, Wells Fargo contends that Lewis had to timely send all three monthly payments of \$3,742.16, and that she was \$1 short on her first payment. Dkts 27 at 8–10 & 31-6. But the offer by its terms only required *either* a message of acceptance *or* payment of the first installment. It's undisputed that Lewis communicated her intent to accept via email. Dkt 27-1 at 46. That's sufficient.

As to performance, Wells Fargo again relies on the \$1 deficiency across three otherwise full payments, all of which were timely made. Dkt 27 at 13. Ignored is the concept of *substantial performance*, which means “performance of the essential elements of a contract, provided that the defects in performance do not prevent the parties from accomplishing the purpose of the contract.” *Matador Drilling Co, Inc v Post*, 662 F2d 1190, 1195 (5th Cir 1981). Substantial performance exists when “there has been no willful departure from the terms of the agreement and no omission in essential points and that the agreement has been honestly and faithfully performed in its material and substantial particulars and the only variance from the strict and literal performance consists of technical or unimportant omissions or details.” *Schweiger v USAA Federal Savings Bank*, 2017 WL 6503660, *4 n 4 (WD Tex) (citation omitted).

Lewis testified that her failure to pay the \$1 was an “unintentional mistake.” Dkt 31-11 at 2. And it's at least debatable among reasonable minds that a failure to pay \$1 out of the requisite amount of nearly \$10,000 isn't a *willful departure* from the agreement, and that Lewis as such *honestly and faithfully* performed in material part. In short, whether the failure to pay \$1 is a breach “so material as to render the contract unenforceable is a question of fact to be determined by the trier of fact.” *Schweiger*, 2017 WL 6503660 at *5.

As to damages, Wells Fargo argues that Lewis hasn't suffered any because she hasn't suffered foreclosure and

can't identify the specific modified loan terms that she was to receive upon completion of her *Flex Modification Trial Plan*. Dkt 27 at 10. Lewis contends that she suffered actual damages in the form of lost financial benefits from a modified loan agreement. Dkt 31 at 15–16. And while the exact terms of such a modified loan agreement were only estimated in the Wells Fargo offer letter, these estimations provide a basis from which to calculate damages. See Dkt 27-1 at 36. A genuine dispute of material fact thus exists on this issue.

Regardless, Lewis also seeks specific performance to reinstatement of the offer of a permanent loan modification. Dkt 21 at ¶19; see also Dkt 31 at 11 (requesting “enforcement of the ‘option’ process that was agreed upon”). Under Texas law, specific performance is an equitable remedy that may be awarded upon a breach of contract, with a required showing that there is (i) no adequate remedy at law, (ii) a readiness to perform, and (iii) performance of other material and contractual obligations by the party seeking specific performance. *Young v Ershick*, 617 F Supp 3d 563, 594–95 (ED Tex 2022). Lewis musters at least some evidence as to each point.

Summary judgment will be denied as to the claim for breach of contract.

4. Conclusion

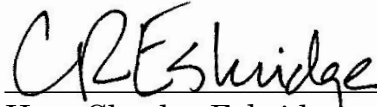
The motion for summary judgment by Defendant Wells Fargo Bank, NA, is GRANTED IN PART and DENIED IN PART. Dkt 27.

It is GRANTED with respect to the claim of violation of the Real Estate Settlement Practices Act. That claim is DISMISSED WITH PREJUDICE.

It is DENIED with respect to the claim of breach of contract.

SO ORDERED.

Signed on September 20, 2024, at Houston, Texas.

A handwritten signature in black ink that reads "C. Eskridge". The signature is written in a cursive style with a horizontal line underneath it.

Hon. Charles Eskridge
United States District Judge