APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1665

JEFFREY B. BROADHURST,

Appellant

v.

CITIMORTGAGE, INC.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(District Court No. 2:18-cv-00121)
District Judge: Honorable Paul S. Diamond

Submitted Under Third Circuit L.A.R. 34.1(a)

On November 20, 2020

Before: JORDAN, KRAUSE, and RESTREPO,
Circuit Judges

(Filed: December 11, 2020)

OPINION

RESTREPO, Circuit Judge.

Appellant Jeffrey Broadhurst contests the District Court's grant of summary judgment in favor of Appellee, CitiMortgage, Inc. ("Citi"). Broadhurst seeks to rescue claims brought under Pennsylvania's Fair Credit Extension Uniformity Act ("FCEUA"), 73 P.S. § 2270, and Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. § 201, as well as for breach of contract, arising from a failed mortgage loan modification attempt. The District Court concluded that Broadhurst's inability to demonstrate that he suffered any ascertainable loss resulting from Citi's alleged misrepresentations, along with his failure to show that Citi breached any contractual duty owed to him in the loan modification process, meant that his claims failed as a matter of law. We will affirm.

I. BACKGROUND

On December 15, 2004, Broadhurst and his then-wife, Danielle Broadhurst, obtained a $354,700 loan from Citi. The Note for the loan was secured by a mortgage against a property that Broadhurst then purchased. For the first ten years of the loan, the Note only required Broadhurst to make monthly interest payments of $1,625.71. After January 1, 2015, however, the interest rate would be subject to change and Broadhurst's monthly payments would include

principal in addition to interest. During the initial period, Broadhurst also was responsible for making property tax and insurance payments on the property.

In February 2014, Broadhurst attempted to obtain a loan modification, and on October 31 of that year retained Attorney David Bifulco to aid him in the process and sent a letter to Citi requesting that Citi direct all future communication to Bifulco as his counsel. Broadhurst maintains, however, that Citi continued to contact him directly multiple times after receiving the October 31 letter. Broadhurst made his final regular loan payment to Citi in September 2014. On July 20, 2016, Citi filed an action in state court to foreclose upon the property, and that action remains pending.

On October 31, 2016, Citi sent a letter to Broadhurst and his wife outlining a Trial Plan, participation in which could serve as a precursor for modification of the loan. The 2016 letter stated: "You are approved to enter into a trial period plan under the Home Affordable Modification Program (HAMP). This is the first step toward qualifying for more affordable mortgage payments." J.A. 177. Under the Trial Plan, Broadhurst would have been required to make three payments of $1,596.22 on December 1, 2016, January 1, 2017, and February 1, 2017. The plan further required the payments and other paperwork to be submitted in a timely fashion. If these conditions were met, among others, Broadhurst's mortgage would be modified.

The letter also gave Broadhurst notice of how payments would be calculated differently under a

modified loan. It explained that the difference between the payments owed during the trial period and those owed prior to that period would be added to the total balance of the loan, along with other past due amounts. It further detailed that, unlike with the original loan, Broadhurst's payments under a modified loan would include an escrow for property taxes and insurance, and that he might have to make additional payments to cover the charges for creating the escrow account.

In a letter dated May 16, 2017, Citi informed Broadhurst and his wife that they had been approved to enter into a mortgage Modification Agreement. In keeping with what the October 2016 Trial Plan letter had stated, the Modification Agreement called for the establishment of an escrow account to hold Broadhurst's property tax and insurance payments, and that the monthly amount due to the account would be $935.86. These payments were the result of an escrow shortage of $7,240.97. Broadhurst's total monthly payment under the loan modification would be $2,306.56. In order to accept the terms, Broadhurst and his wife were instructed to sign and return the Modification Agreement to Citi by May 30, 2017.

Broadhurst maintains the letter and enclosed Modification Agreement were not sent to him in a timely manner, and that he only physically received the letter after the May 30, 2017 deadline. It is undisputed that Citi's counsel, Powers Kirn, emailed the letter and Modification Agreement to Broadhurst's counsel, Bifulco, on May 26, 2017, but Bifulco purportedly did not receive the letter until after the end of the Memorial Day holiday. Neither Broadhurst

nor his wife signed and returned the Agreement at any point, nor did they make any of the payments specified by the agreement.

II. DISCUSSION[1]

A. Broadhurst's claims under the UTPCPL and FCEUA cannot succeed

Broadhurst alleges violations of two separate statutes. In Count One of his Complaint, Broadhurst contends that the FCEUA was violated due to Citi's continued direct correspondence with him after his retention of counsel. In Count Two, Broadhurst alleges that Citi's untimely sending of the Modification Agreement to Broadhurst and his attorney, along with Citi's providing "contradictory information" about the modification itself, constituted "a per se violation of the pertinent statutes." Appellant Br. at 9. In Count Three, Broadhurst alleges further violations of both statutes based on a violation of the Truth in Lending Act, see 15 U.S.C. § 1601 et seq. None of these Counts can be sustained.

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[1] The District Court had jurisdiction under 28 U.S.C. § 1332. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the District Court's grant of summary judgment. *Goldenstein v. Repossessors Inc.*, 815 F.3d 142, 146 (3d Cir. 2016). "Viewing the evidence in the light most favorable to the nonmovant, summary judgment is appropriate only if there is 'no genuine issue as to any material fact [such] that the moving party is entitled to judgment as a matter of law.'" *Kelly v. Borough of Carlisle*, 622 F.3d 248, 253 (3d Cir. 2010) (quoting Fed. R. Civ. P. 56(c)).

The UTPCPL prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." 73 P.S. § 201-3. In *Kaymark v. Bank of America*, N.A., 783 F.3d 168 (3d Cir. 2015), this Court explained that a plaintiff maintaining a private right of action under the UTPCPL must demonstrate: (1) "ascertainable loss of money, real or personal," (2) "'as a result of' the defendant's prohibited conduct under the statute." Id. at 180 (quoting 73 P.S. § 201-9.2(a)). "[T]he loss must be nonspeculative." Id. (citing *Schwarzwaelder v. Fox*, 895 A.2d 614, 619 (Pa. Super. Ct. 2006)). Plaintiffs must also show that this loss occurred due to their "justifiable reliance" upon the defendant's unlawful conduct. *Hunt v. U.S. Tobacco Co.*, 538 F.3d 217, 222 (3d Cir. 2008); *see also Yocca v. Pittsburgh Steelers Sports, Inc.*, 854 A.2d 425, 438 (Pa. 2004) ("To bring a private cause of action" under the UTPCPL, "a plaintiff must show that he justifiably relied on the defendant's wrongful conduct or representation and that he suffered harm as a result of that reliance.").

The FCEUA prohibits "unfair methods of competition and unfair or deceptive acts or practices with regard to the collection of debts." 73 P.S. § 2270.2. Because the FCEUA is "enforced through the remedial provision of the UTPCPL," a plaintiff "cannot state a claim for relief under the FCEUA if he cannot state a claim for relief under the UTPCPL." *Kaymar*k, 783 F.3d at 182. In other words, if a plaintiff's UTPCPL claim fails, his FCEUA claim fails as well.

The District Court concluded that Broadhurst failed to show ascertainable loss with respect to Citi's purported direct communications with Broadhurst

and its untimely sending of the Modification Agreement, even assuming that such conduct might constitute false or deceptive misrepresentations under the FCEUA and UTPCPL. The Court was correct in

doing so. First, Broadhurst's argument that Citi's alleged direct contacts with him are per se violations of the UTPCPL has no basis in Third Circuit or Pennsylvania case law. Demonstration of ascertainable loss, in the form of actual damages, is an essential element of his cause of action, and Broadhurst failed to show any actual damages as a result of the alleged contacts.

The District Court also properly rejected Broadhurst's belated attempt to show ascertainable loss at summary judgment, where he alleged for the first time in his opposition that he suffered damages due to lost work time, travel to the police station in reporting Citi's misconduct, and legal fees. We have held that where a plaintiff "did not properly request leave to file an amended complaint," then "the District Court did not abuse its discretion in not granting it." *Ranke v. Sanofi-Synthelabo Inc.*, 436 F.3d 197, 206 (3d Cir. 2006). Although Broadhurst contends that the District Court should have granted him leave to amend his Complaint based on the submissions contained within his Counterstatement of Facts, he did not actually request leave from the Court to amend his Complaint, nor could he ground his theory of ascertainable loss in the evidence produced in discovery.

Finally, the District Court was correct in rejecting Counts Two and Three of Broadhurst's Complaint, as the October 2016 Trial Plan letter expressly stated that the amount computed in a future modification would include escrow for property taxes and insurance, explaining the disparity between the amounts owed during the Trial Plan itself and in the period governed by the proposed Modification Agreement.

B. Broadhurst's breach of contract claim must also fail

In the proceedings below, Broadhurst premised his breach of contract claim on the theory that the monthly payment amount outlined in the Modification Agreement was significantly higher than what had been promised in the Trial Plan. This argument was rejected by the District Court, and Broadhurst does not renew it here. Instead, Broadhurst now tethers his breach of contract claim to Citi's alleged delay in forwarding him the Mod-ification Agreement, along with setting an overly restrictive timeline for the document's return.

In order to establish a breach of contract claim under Pennsylvania law, a party must show "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract[,] and (3) resultant damages." *Ware v. Rodale Press, Inc.*, 322 F.3d 218, 225 (3d Cir. 2003) (quoting *CoreStates Bank, N.A. v. Cutillo*, 723 A.2d 1053, 1058 (Pa. Super. Ct. 1999)). Even assuming, arguendo, that the Trial Plan constituted a contract between Broadhurst and Citi, Broadhurst has not cited anything in it that specifies by when the Modification Agreement would

be presented to him, or by when he would have to consider it. Moreover, in his deposition, Broadhurst testified that the terms of the Modification Agreement were unacceptable, and even if he had additional time to review its terms, he was unlikely to have accepted them. Consequently, Broadhurst is unable to point to a contractual duty that was breached by Citi, nor any actual damages that he incurred due to Citi's conduct.

III. CONCLUSION

For the foregoing reasons, we will affirm the District Court's grant of Citi's motion for summary judgment.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEFFREY B. BROADHURST,

v.

CITIMORTGAGE, INC.,

Civ. No. 18-121

ORDER

In his largely incoherent Complaint, Plaintiff Jeffrey B. Broadhurst, who is represented by counsel, alleges that Defendant CitiMortgage, Inc. violated the Fair Credit Extension Uniformity Act and the Unfair Trade Practices and Consumer Protection Law by: (1) failing to provide timely loan modification paperwork; (2) directly communicating with Plaintiff, rather than his lawyer; and (3) failing to disclose an increase in Plaintiff's monthly loan modification installments. See 73 P.S. §§ 2270, 201. Plaintiff also alleges that these wrongful actions amount to a breach of contract. (Compl. ¶¶ 33–34.) Defendant has moved for summary judgment, and Plaintiff has responded. (Doc. Nos. 20, 21.) I will grant Defendant's Motion and enter judgment in favor of Citi.

I. PROCEDURAL HISTORY

On January 10, 2018 Defendant timely removed this matter from state court, invoking diversity jurisdiction. (Notice of Removal, Doc. No. 1 at ¶¶ 12–23); 28 U.S.C. § 1332. The Parties, unable to resolve the matter, completed discovery. Defendant then filed the instant Motion with accompanying exhibits and a statement of material facts. (Doc. No. 20.) Plaintiff responded eight days after his deadline to do so. (Doc. Nos. 21, 22, 23.) Defendant has replied. (Doc. No. 24.)

II. LEGAL STANDARD

I may grant summary judgment "where the moving party has established that there is no genuine dispute of material fact and 'the moving party is entitled to judgment as a matter of law.'" *Hugh v. Butler Cty. Family YMCA*, 418 F.3d 265, 266 (3d Cir. 2005) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322(1986)); see Fed. R. Civ. P. 56(c). I "must view the facts in the light most favorable to the non-moving party," and make every reasonable inference in that party's favor. *Hugh*, 418 F.3d at 267. If I then determine that there is no genuine issue of material fact, summary judgment is appropriate. *Celotex*, 477 U.S. at 322.

Summary judgment is appropriate where the moving party shows that there is an absence of evidence to support the nonmoving party's case. Id. at 325. Where the moving party identifies such an absence, the nonmoving party "must rebut the motion with facts in the record and cannot rest solely on assertions made in the pleadings, legal memoranda, or

oral argument." *Berckeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 201 (3d Cir. 2006).

III. FACTUAL BACKGROUND

I have resolved all factual disputes and construed all facts in Plaintiff's favor. *Hugh*, 418 F.3d at 267. I have disregarded factual allegations that Plaintiff makes without any evidentiary support. See *Celotex*, 477 U.S. at 322–23; *Jones v. UPS*, 214 F.3d 402, 407 (3d Cir. 2000) (requiring more than "unsupported allegations" to defeat summary judgment). Although Plaintiff includes only one citation to the record in his counter-statement of material facts, I have considered those counter-statements for which I have found evidentiary support.

Plaintiff and his then-wife, Danielle Broadhurst, obtained a $354,700 loan from Citi in a December 15, 2004 Note. (Compl. ¶¶ 1, 3; Def.'s Stmt. Mat. Facts ¶ 1; Def.'s App. Ex. A, Doc. No. 20-3.) The Note was secured by a mortgage against property located in Landsdale, PA. (Id.) Plaintiff used the loan proceeds to purchase that property. (Def.'s Stmt. Mat. Facts ¶ 2.)

The Note required monthly interest payments of $1,625.71 from February 1, 2005 through January 1, 2015. (Id. at ¶ 3; Def.'s App. Ex. A ¶¶ 3–4.) On January 1, 2015, the interest rate was subject to change, and payments would then include both principal and interest. (Def.'s App. Ex. A ¶ 4.) These monthly payments did not cover property tax and insurance costs. (Def.'s Stmt. Mat. Facts. ¶ 4; Pl.'s Stmt. Mat. Facts 1, Doc. No. 23; Alsiweadi Dec., Doc.

No. 20-6.) Rather, Plaintiff and his wife were responsible for making property tax and insurance payments "unless and until" Citi required Plaintiff to create an escrow account. (Id.)

In February 2014, Plaintiff attempted to refinance the mortgage, and in October 2014 he hired Attorney David Bifulco to help him obtain a loan modification. (Compl. ¶ 4; Def.'s Stmt. Mat. Facts. ¶¶ 8–9.) On October 31, 2014, Bifulco sent Citi a letter demanding that Citi "cease and desist from contacting the plaintiff" and instead contact Plaintiff through counsel. (Compl. ¶ 5.) After "agents conduct[ed] surveillance on the plaintiff's property to the point that police were called," Bifulco sent another notice asking Defendant to communicate "any and all matters" to him, rather than to his client. (Id. at ¶ 6–7.) Plaintiff made his last regular monthly loan payment to Citi in September 2014. (Def.'s Stmt. Mat. Facts. ¶ 11; Alsiweadi Dec. ¶ 14.)

On July 25, 2016, Citi filed for foreclosure against Plaintiff and his wife in the Montgomery County Common Pleas Court. (Compl. ¶ 8.) That action remains pending. (Compl. ¶ 8; Def.'s Stmt. Mat. Facts. ¶ 12.) Bifulco represents Plaintiff in the foreclosure action, and Powers Kirn, LLC represents Citi. (Def.'s Stmt. Mat. Facts ¶ 13.)

On October 31, 2016, Citi sent Plaintiff and his wife a letter stating: "You are approved to enter into a trial period plan under the Home Affordable Modification Program (HAMP)." (Def.'s App. Ex. I, Doc. No. 20-11; Def.'s Stmt. Mat. Facts ¶ 16.) The plan required Plaintiff to make three separate $1,596.22

payments on December 1, 2016, January 1, 2017, and February 1, 2017. (Def.'s App. Ex. I; Def.'s Stmt. Mat. Facts ¶ 17.) The letter further explained that Plaintiff's loan would be modified only if certain conditions were met, including timely receipt of trial payments and paperwork. (Def.'s App. Ex. I; Def.'s Stmt. Mat. Facts ¶ 18; Pl.'s Stmt. Mat. Facts 2.) The letter also provided:

> Any difference between the amount of the trial period payments and your regular mortgage payment will be added to the balance of your loan along with any other past due amounts as permitted by your loan documents. While this will increase the total amount that you owe, it should not significantly change the amount of your modified mortgage payment.

(Def.'s App. Ex. I at page 5; Def.'s Stmt. Mat. Facts. ¶ 19.)

The letter also advised that if Plaintiff's loan were permanently modified, new payments would include an escrow for property taxes and insurance. (Def.'s App. Ex. I at page 6.) If Plaintiff's property taxes or insurance increased, his monthly payments would increase as well. (Id.) Finally, the October 31 letter provided that Plaintiff would agree to the creation of an escrow account, and that he might have to make additional payments to cover the charges for creating such an account. (Id. at 4, 8.)

In its May 16, 2017 letter, Citi informed Plaintiff and his wife that they had been approved for a Home Affordable Modification. (Def.'s App. Ex. J, Doc. No. 20-12; Def.'s Stmt. Mat. Facts. ¶ 23.) To

accept the offer, Plaintiff and his wife had to sign and return the enclosed Modification Agreement by May 30, 2017. (Id.) On May 26, 2017, Powers Kirn emailed the May 16 letter and the Modification Agreement to Bifulco. (Pl.'s Stmt. Mat. Facts 3; Def.'s App. Ex. K, Doc. No. 20-13.)

The letter stated that an escrow account had been created for property taxes and insurance, and that the monthly escrow payment would be $935.86. (Def.'s App. Ex. J at 4; Def.'s Stmt. Mat. Facts. ¶ 25.) Citi further explained that the monthly $935.86 payments resulted from an escrow shortage of $7,240.97. (Def.'s App. Ex. J at 4.) In total, the Modification Agreement presented in the May 16 letter provided for a forty-year term with monthly payments of $2,306.56 (monthly escrow payments plus monthly principal and interest payments). (Id. ¶¶ 3(E), 3(F).)

Bifulco purportedly did not see the email from Powers Kirn until after he returned to work from his Memorial Day holiday. (Pl.'s Stmt. Mat. Facts 3.) Plaintiff purportedly did not receive the Modification Agreement and May 16, 2017 letter until after the submission deadline had passed. (Id.)

Plaintiff did not sign or return the Modification Agreement, nor did he make any of the monthly $2,306.56 payments. (Def.'s Stmt. Mat. Facts ¶¶ 29–; Pl.'s Stmt. Mat. Facts 5; Alsiweadi Dec. ¶ 12.) Plaintiff testified that the terms in the Modification Agreement were "unacceptable" and that he probably would not have agreed to them, even if he had been allowed time

to review them with Bifulco. (Broadhurst Dep. 130–31.)

IV. DISCUSSION

Plaintiff alleges: (1) two violations of the UTPCPL and FCEUA (73 P.S. §§ 201, 2270);

(2) one violation of the UTPCPL and FCEUA predicated upon a Truth in Lending Act violation (15 U.S.C. § 1601); and (3) breach of contract. All four counts will be dismissed.

A. FCEUA/UTPCPL Claims

Plaintiff alleges in Count One that Citi violated the FCEUA by directly contacting Plaintiff when he was represented by counsel, and by sending the permanent modification agreement in an untimely manner. (Compl. ¶¶ 17–20); 73 P.S. § 2270.4(b)(2).) Plaintiff alleges in Count Two that the increase in monthly payments from the trial period plan to the permanent modification agreement constituted a "false, deceptive, or misleading representation." (Compl. ¶¶ 23–26); 73 P.S. § 2270.4(b)(5). Both claims are baseless.

The FCEUA prohibits "unfair methods of competition and unfair or deceptive acts or practices with regards to the collection of debts." 73 P.S. § 2270.2 (2000); *Kaymark v. Bank of Am., N.A.*, 783 F.3d 168, 182 (3d Cir. 2015). Under the statute, "[i]f a debt collector or creditor engages in an unfair or deceptive debt collection act or practice, . . . it shall constitute a violation of" the UTPCPL. § 2270.5. The Third Circuit has thus held that the FCEUA "is enforced through

the remedial provision of the UTPCPL." *Kaymark*, 783 F.3d at 182. Accordingly, to make out a claim for relief under the FCEUA, Plaintiff must also make out a claim for relief under the UTPCPL. Id.

"To maintain a private right of action under the UTPCPL, a plaintiff must demonstrate: (1) 'ascertainable loss of money or property, real or personal,' (2) 'as a result of' the defendant's prohibited conduct under the statute." Id. at 180 (quoting 73 P.S. § 201-9.2(a)). The UTPCPL allows for statutory damages of $100 per violation if the plaintiff can demonstrate an ascertainable loss, which "must be non-speculative." 73 P.S. § 201-9.2(a); *Kaymark*, 783 F.3d at 180 (citations omitted). The Plaintiff thus "must be able to show an actual loss of money or property." *Jarzyna v. Home Properties*, L.P., 185 F.Supp.3d 612, 626 (E.D. Pa. 2016) (citing *Kaymark*, 783 F.3d at 180). Attorney fees are not considered an ascertainable loss under the FCEUA and the UTPCPL. *Grimes v. Enterprise Leasing Co. of Philadelphia, LLC*, 105 A.3d 1188, 1193 (Pa. 2014) ("mere acquisition of counsel" is not an ascertainable loss). Finally, "a plaintiff's loss-causing reliance on the prohibited conduct must be justifiable for such conduct to give rise to a UTPCPL claim." *Walkup v. Santander Bank, N.A.*, 147 F.Supp.3d 349, 358 (E.D. Pa. 2015) (citing *Yocca v. Pittsburgh Steelers Sports, Inc.*, 854 A.2d 425, 438 (Pa. 2004)).

In sum, to succeed on his first two claims, Plaintiff must demonstrate both that Citi made a false, deceptive, or misleading representation, and that he suffered an ascertainable loss as a result of his justifiable reliance on any such misrepresentation.

Citi's Contacts and "Untimely" Paperwork

Assuming, arguendo, that Citi's repeated communications with Plaintiff and Citi's alleged failure to send timely paperwork constituted false or deceptive misrepresentations under the FCEUA and UPTCPL, there is no evidence that he suffered any ascertainable loss as a result of those contacts or untimeliness. Plaintiff alleges only that he is entitled to statutory damages under the UPTCPL as a result of the challenged contacts. (Interrogatory Responses 2, Doc. No. 20-15.) As I have discussed, the UPTCPL allows for those damages only if a plaintiff can show ascertainable loss. He alleges no quantifiable damages caused by the contacts or the "untimely" paperwork.

Remarkably, Plaintiff responds that he "believes that the UTPCPL and the FCEUA never contemplated that a plaintiff should have to prove out of pocket losses for receipt of prohibited communications." (Opp. Summ. J. at 4, Doc. No. 21.) This "belief"—which Pennsylvania courts have rejected—is no response at all. See *Kaymark*, 783 F.3d at 180, 182.

Finally, in opposing summary judgment, Plaintiff alleges for the first time that he suffered an ascertainable loss because he was forced to travel to the police station to report Citi's alleged misconduct, he lost work time addressing his dispute with Citi, and he had to pay legal fees. (Opp. Summ. J. at 5.) These belated allegations are impermissible and have no evidentiary support. *See Price v. City of Philadelphia*, 239 F. Supp. 3d 876, 900 n.17 (E.D. Pa. 2017) (Plaintiff

cannot add new bases for legal claims claims in opposing a motion for summary judgment); *see also Bell v. City of Philadelphia*, 275 F. App'x 157, 160 (3d Cir. 2008).

In sum, because Plaintiff has not shown that he suffered any ascertainable loss, I will grant summary judgment as to Count One.

Monthly Payment Increase

In Count Two, Plaintiff alleges that "the trial payments under the temporary modification agreement were set at $1,596.00 per month, but the permanent modification agreement increased the monthly payment to $2,307.00," and that "this increase in monthly installments was not disclosed to the plaintiff," in violation of the law. (Compl. ¶¶ 23–25.) The record shows just the opposite.

In the October 31 letter, Citi explained the Temporary Payment Plan in detail, and advised Plaintiff that his monthly payment might increase: "Your new monthly payment will include an escrow for property taxes, insurance and other escrowed expenses. If the cost of your property taxes, insurance or other escrowed expenses increases, your monthly payment will increase as well." (Def.'s App. Ex. I at 7.) Moreover, although Plaintiff alleges that "it appears that CitiMortgage has additionally charged plaintiff for the difference between the two figures without explanation," he again offers no supporting evidence. (Opp. Summ. J. at 7.) Plainly, Plaintiff cannot demonstrate any false, deceptive, or misleading representation with regard to the monthly payment increases.

In sum, I will also dismiss Count Two.

B. FCEAU/UTPCPL Claim Predicated Upon TILA

Plaintiff bases his third FCEAU and UPTCPL claim on the Truth in Lending Act. (Compl. ¶¶ 29–31.) This is frivolous: a violation of TILA plainly is not grounds to recover under the FCEUA or the UTPCPL. Plaintiff thus cannot prevail on this claim as a matter of law. *Garczynski v. Countrywide Home Loans, Inc.*, 656 F. Supp. 2d 505, 514–15 (E.D. Pa. 2009) ("Many judges in this District have rejected Plaintiffs' argument that TILA and RESPA violations are per se violations of the UTPCPL."); *Morilus v. Countrywide Home Loans, Inc.*, 651 F. Supp. 2d 292, 309 (E.D. Pa 2008) (no legal authority showing that a TILA or RESPA violation is a per se UTPCPL violation); *Christopher v. First Mutual Corp*, No. 05-0115, 2008 WL 1815300, at *13–15 (E.D. Pa. Apr. 22, 2008) (same).

Moreover, Plaintiff alleges that Citi violated TILA (and thus the FCEUA/UPTCPL) by failing to disclose that "the permanent monthly installment would increase from $1,596.00 per month to $2,307.00 per month." (Compl. ¶ 29.) As I have discussed, the evidence shows just the opposite. Accordingly, even if Count Three had a basis in law, it has none in fact.

In these circumstances, I will dismiss Count Three.

C. Breach of Contract

Plaintiff's fourth claim against Citi is that "Defendant's increasing the temporary mortgage installment from $1,596.00 to $2,307.00 significantly increased the amount of the modified mortgage payment," and constitutes a breach of contract. This is unpersuasive.

Under Pennsylvania law, a party alleging breach of contract must establish: "'(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract[,] and (3) resultant damages.'" *Ware v. Rodale Press*, *Inc.*, 322 F.3d 218, 225 (3d Cir. 2003) (quoting *CoreStates Bank, N.A. v. Cutil*lo, 723 A.2d 1053 (Pa. Super. Ct. 1999)). Courts in this District have found that, at the very most, a trial payment plan can obligate a mortgagor to "either offer a modification agreement or send . . . a written denial." *Cave v. Saxon Mortgage Servs.*, Inc., No. 11-4586, 2012 WL 1957588, at *5–6 (E.D. Pa. May 30, 2012).

Although his Complaint is a mass of confusion, it appears that Plaintiff believes the October 31 letter constitutes a contract that Citi breached because the permanent modified monthly payments were higher than the temporary payments. First, there was no contract guaranteeing a permanent loan modification: although Plaintiff made the required trial period payments, the October 31 letter did not entitle him to a permanent modification. See, e.g., *Fennimore v. Bank of America, N.A.*, No. 14-06883, 2015 WL 7075814, at *6–7 (E.D. Pa. Nov. 12, 2015).

Moreover, in its letter, Citi nowhere promises what the modified permanent payments would be. To the contrary, Citi warns that the monthly payments could increase, particularly if Plaintiff had an escrow shortage: "Your new monthly payment will include an escrow for property taxes, insurance and other escrowed expenses. If the cost of your property taxes, insurance or other escrowed expenses increases, your monthly payment will increase as well." (Def.'s App. Ex. I at

7.) Plaintiff's allegation that "Defendant's increasing the temporary mortgage installment from $1,596.00 to $2,307.00" constitutes a breach of contract is thus ludicrous.

I thus will dismiss Count Four.

V. CONCLUSION

In sum, Plaintiff's Complaint is baseless and his arguments against Defendant's Motion are frivolous. Accordingly, I will grant Defendant's Motion for Summary Judgment in full.

An appropriate Judgment follows.

AND IT IS SO ORDERED.

/s/ Paul S. Diamond

February 26, 2020
Paul S. Diamond, J.