

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAIME A. RIOS IA Part 8  
Justice

<u>FREMONT INVESTMENT AND LOAN</u>	x	Index Number <u>13559</u> 2007
- against -		Motion Date <u>May 29,</u> 2008
ROBERTA HALEY, et al.,		Motion Cal. Number <u>1</u>
	x	Motion Seq. No. <u>1</u>

The following papers numbered 1 to 13 read on this motion by plaintiff for summary judgment in its favor pursuant to CPLR 3212, to strike the answer of defendants Roberta Haley and William Haley, Jr., pursuant to CPLR 3211, for leave to appoint a referee to ascertain and compute the amount due and owing plaintiff and to ascertain whether the premises may be sold in parcels, for leave to amend the caption deleting "John Doe" as a party defendant, and to deem all defendants which have not appeared, or answered the complaint, to be in default in the action.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-6
Answering Affidavits - Exhibits.....	7-11
Reply Affidavits.....	12-13

Upon the foregoing papers it is ordered that the motion is resolved as follows.

This motion was marked fully submitted on May 29, 2008. On October 15, 2008, the motion was reassigned to this court, based upon recusal by Justice Charles J. Markey. By order of this Court (Rios, J.) dated October 20, 2008, the motion was held in abeyance pending a settlement conference pursuant to CPLR 3408 (L 2008, ch 472, § 3). The parties have failed to reach a settlement and the motion submitted on May 29, 2008 is now fully submitted for consideration.

Plaintiff commenced this action seeking foreclosure of a mortgage given by defendants Roberta Haley and William Haley, Jr.

on the real property known as 68-23 53rd Avenue, Maspeth, New York to secure a note evidencing a loan, in the principal amount of \$624,000.00, plus interest. Plaintiff alleges that defendants Haley defaulted under the mortgage by failing to pay the monthly mortgage installment payment due on January 1, 2007, and that it elected to accelerate the mortgage debt and declare all sums secured by the mortgage to be due and payable.

Defendants Haley served an answer, denying the material allegations of the complaint, asserting various affirmative defenses and interposing various counterclaims seeking monetary and punitive damages, rescission of the subject mortgage and note, and an award of attorneys' fees. In substance, defendants Haley allege that plaintiff engaged in predatory lending tactics, in violation of state and federal law, and fraudulently induced the Haleys to enter into an unconscionable mortgage transaction based upon an inflated and improper appraisal. Defendants Haley claim that they were defrauded by plaintiff, a mortgage broker and others, into accepting a mortgage loan from plaintiff, and that plaintiff knew the loan could not be repaid and that as an inevitable result, the mortgage would fall into foreclosure. In its reply, plaintiff denied the allegations set forth in each of the counterclaims of defendants Haley. Defendants New York City Environmental Control Board and New York City Transit Adjudication Bureau have defaulted in appearing and answering the complaint.

Plaintiff has determined that there are no tenants residing at the premises, and therefore, defendant "John Doe" is an unnecessary party defendant. That branch of the motion seeking leave to amend the caption deleting defendant "John Doe" is granted.

That branch of the motion seeking to fix the default in appearing or answering the complaint on the part of defendants New York City Environmental Control Board and New York City Transit Adjudication Bureau is granted.

With respect to that branch of the motion for summary judgment, "[i]n order to establish its prima facie entitlement to summary judgment in a foreclosure action, a plaintiff must submit the mortgage and unpaid note, along with evidence of default (see Hoffman v Kraus, 260 AD2d 435, 436 [1999]; Mahopac Natl. Bank v Baisley, 244 AD2d 466, 467 [1997]). The burden then shifts to the defendant to demonstrate 'the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff' (id. at 467; see Nassau Trust Co. v Montrose Concrete Prods. Corp., 56 NY2d 175, 183 [1982])" (U.S. Bank Nat.

Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998-2] v Alvarez, 49 AD3d 711 [2008]].

Plaintiff has submitted, among other things, a copy of the mortgage and note executed by defendants Haley, and affidavits of Margie Kwiatkowski, an assistant vice-president of plaintiff, and John Kerr, a self-described "Limited Signing Officer" of GMAC MORTGAGE LLC, the servicing agent for plaintiff, attesting to a default in payment thereunder on January 1, 2007. Plaintiff, therefore, has established a prima facie case of entitlement to judgment against defendants Haley as a matter of law (see EMC Mortgage Corp. v Riverdale Associates, 291 AD2d 370 [2002]; Republic Natl. Bank of N.Y. v Zito, 280 AD2d 657, 658 [2001]; see also IMC Mtge. Co. v Griggs, 289 AD2d 294 [2001]; Paterson v Rodney, 285 AD2d 453 [2001]). The burden shifts to defendants Haley to raise a triable issue of fact regarding their defenses (see Barcov Holding Corp. v Bexin Realty Corp., 16 AD3d 282 [2005]; EMC Mtge. Corp. v Riverdale Assoc., 291 AD2d 370 [2002]; First Nationwide Bank, FSB v Goodman, 272 AD2d 433 [2000]).

Defendants Haley oppose the motion arguing that plaintiff's foreclosure claim and their affirmative defenses and counterclaims are interwoven so as to preclude plaintiff's entitlement to summary judgment. Defendants Haley offer their respective affidavits, indicating that they contacted a mortgage broker seeking to refinance their existing mortgage loan. They sought to pay off a total of \$100,000.00 in accumulated medical bills and credit card debt. Defendants Haley state the mortgage broker informed them that their house had been appraised for \$780,000.00, and plaintiff would approve a mortgage loan in the principal amount of \$624,000.00. Defendants Haley indicate that they inquired regarding the other terms of the loan, but did not receive any additional information, and attended the loan's closing on October 4, 2006, not knowing any term or condition, other than the principal amount. Defendants Haley aver they were unrepresented by counsel at the closing. They further aver they were not provided with copies of the loan documents which they signed at the closing, but were told by the attorney representing plaintiff that the copies would arrive thereafter by mail. Defendants Haley state they first learned of the actual amount of the monthly mortgage installment payment when they received, after closing, a notice from plaintiff indicating the amount was \$5,700.00, and that such amount would increase to \$6,400.00 after three years, and adjust every six months thereafter. Defendants Haley state that the new monthly installment amount was almost twice their former one, and that they were unable to make such payments, and did not knowingly agree to pay them.

Defendants Haley complain that plaintiff never sent a copy of the signed loan documents, and never responded to their subsequent requests for copies of the signed loan documents. According to defendants Haley, they were shocked to learn, upon reviewing the exhibits annexed to plaintiff's motion, that the mortgage called for monthly payments with a "high" rate of interest and a final balloon payment (due on November 1, 2036), and that they paid fees totaling over \$21,500.00 at the closing. Defendants Haley further indicate that the mortgage application, which had been prepared by the mortgage broker, contained several erroneous statements, including that their assets totaled \$1.56 million dollars, their combined post-tax monthly income was \$13,990.00, and the information recited on the application had been provided by them in a face-to-face interview with the mortgage broker. Defendants Haley state that Roberta Haley was unemployed at the time of they applied for the loan, William Haley, Jr.'s gross annual income is \$75,000.00, and they provided the information to the mortgage broker over the telephone. They admit, however, they signed the loan application at the closing, without reviewing it or knowing its contents.

The first affirmative defense raised by defendants Haley based upon failure to state a cause of action is improperly pleaded as an affirmative defense and is stricken (Glenesk v Guidance Realty, 36 AD2d 852 [1971]; Propoco, Inc. v Birnbaum, 157 AD2d 774 [1990]; Bentivegna v Meenan Oil, Inc., 126 AD2d 506 [1987]).

With respect to the second affirmative defense and first counterclaim based upon fraudulent inducement, defendants Haley make no allegation that plaintiff made any misrepresentations regarding the loan terms. The loan documents sufficiently disclosed the terms of the loan, and defendants Haley, who admittedly failed to read the documents prior to signing them, make no claim that plaintiff falsified the loan application, or the loan documents. In addition, defendants Haley offer no evidence that the mortgage broker was an agent for plaintiff, or acted in concert with plaintiff to defraud them, and therefore, have failed to demonstrate that any misrepresentation made by the mortgage broker is attributable to plaintiff. Rather, defendants Haley claim that they were not apprised, prior to the closing, of the material terms of the loan and the fees to be charged, and were not given a copy of a consumer handbook on adjustable rate mortgages. They further claim that they were also not provided with a copy of the signed loan documents and notice of their right to cancel the transaction.

As a general rule, the signer of a written agreement is deemed to be conclusively bound by its terms, in the absence of a showing of fraud, duress or some other wrongful act by a party to the contract (see Pimpinello v Swift & Co., 253 NY 159 [1930]; Columbus Trust Co. v Campolo, 110 AD2d 616 [1985], affd 66 NY2d 701 [1985]). To the extent defendants Haley signed the mortgage application at the closing, without reading it, and thus were unaware the application contained incorrect and exaggerated figures, they risked that plaintiff would be induced to give them a loan in an amount they could not afford. Although defendants Haley assert the attorney representing plaintiff at the closing hurried them to sign the "stack" of documents, such conduct, if true, does not rise to the level of fraud, duress or wrongful conduct on plaintiff's part. Defendants Haley make no claim that they requested and were refused, an opportunity to read the papers, consult with an attorney or someone else, have the documents explained to them, or adjourn the closing. Furthermore, they concede that the counsel representing plaintiff provided "absolutely no explanation" as to the contents of the documents. In addition, they chose to attend the closing without an attorney even though they had received no written disclosure materials in advance of the closing. Nor do defendants Haley claim plaintiff misrepresented that they did not need to retain an attorney to advise them in relation to the transaction or at the closing. Defendants Haley, therefore, are bound by the terms of the instruments they signed (see Pimpinello v Swift & Co., 253 NY 159 [1930], supra). The second affirmative defense and first counterclaim asserted by defendants Haley is dismissed.

As third and fourth affirmative defenses and second and third counterclaims, defendants Haley assert that plaintiff violated Home Ownership and Equity Protection Act of 1994 (15 USC § 1639) ("HOEPA"), an amendment to the Truth in Lending Act (15 USC § 1601 et seq.) ("TILA"). Defendants Haley, however, have failed to offer any proof that the subject mortgage loan is governed by HOEPA. The subject mortgage may be considered a "consumer credit transaction" (see 15 USC § 1602[h]) with a "creditor" (see 15 USC § 1602[f]), secured by the "consumer's principal dwelling" (see 15 USC § 1602[v]), other than a residential mortgage transaction (as otherwise defined under TILA), a reverse mortgage transaction, or a transaction under an open end credit plan (see Bankers Trust Co. of California v Payne, 188 Misc 2d 726 [2002]). Nevertheless, defendants Haley have failed to demonstrate the annual percentage rate of interest at consummation for the loan transaction exceeded the statutory threshold level (see 15 USC § 1602[aa][1][A]) or that "the total points and fees" they paid at or before closing exceeded 8 percent of the total loan amount (see 15 USC § 1602[aa][1][B]).

The third and fourth affirmative defenses and the second and third counterclaim are dismissed.

Defendants Haley claim as a fifth affirmative defense that the mortgage loan was substantively unconscionable in light of their financial circumstances. Defendants Haley, however, permitted the mortgage broker to exaggerate their income and assets when preparing the loan application, to induce plaintiff to give them the loan. Having permitted such exaggeration to induce the granting of the loan, they cannot be heard to complain of the consequences. In any event, they have failed to support this defense with any factual allegation indicating an absence of meaningful choice on their part (see King v Fox, 7 NY3d 181 [2006]; Glenesk v Guidance Realty Corp., 36 AD2d 852 [1971], supra).

The sixth affirmative defense and the fourth counterclaim asserted by defendants Haley are based upon their claim that plaintiff, and others violated the "Federal Settlement Procedures Act." The court is unaware of any federal act known by that name, but assumes that defendants Haley are referring to the Real Estate Settlement Procedures Act (RESPA), (12 USC § 2601 et seq.). RESPA applies to lenders who offer "federally related mortgage loans" (see 12 USC § 2605). RESPA requires mortgage lenders and mortgage brokers (to the extent they are not the lender's exclusive agent), to disclose the costs associated with real estate closings (12 USC § 2603; 24 CFR § 3500.7). Section 2603 of RESPA provides for the use of a standard form, commonly known as a "HUD-1," for the statement of settlement costs to be used in connection with real estate transactions in the United States which involve federally related mortgage loans. RESPA requires that a lender or mortgage broker provide an informational booklet to a borrower seeking to finance the purchase of residential real estate, so the borrower can better understand the nature and costs of real estate settlement services. It also requires the lender or mortgage broker to provide the borrower with a written good faith estimate, disclosing the amount or range of charges for specific settlement services, costs and fees incurred with the mortgage before the credit is extended, or within three days of receiving the loan application, whichever happens first (12 USC § 2604[c]; 24 CFR 3500.7[a], [b]).

Defendants Haley, however, have failed to demonstrate that the subject mortgage loan is a federally related mortgage loan (see 12 USC § 2602). In addition, a RESPA violation does not adversely affect the validity or enforceability of a federally related mortgage loan (see 12 USC § 2615; see also G.E. Capital Mortgage Services, Inc. v Baker, No. CV 980167089S, 1999 WL 511156, 1999

Conn Super LEXIS 1791 [Conn Super Ct, July 7, 1999] [applying section 2615]; Security Pacific Natl. Bank v Robertson, No. CV 920124622S, 1997 WL 561235, 1997 Conn Super LEXIS 2306, [Conn Super Ct, August 28, 1997]; cf. Bibler v Arcata Investments 2, LLC, No. 263024, 2005 WL 3304127 [Mich Ct App, Dec. 6, 2005]). Thus, a disclosure violation of RESPA does not constitute a valid defense to mortgage foreclosure (see Webster Bank v Linsley, 2001 WL 1042581 [Conn Super Ct, August 14, 2001]).

RESPA also does not create a private right of action for rescission for failure to disclose settlement costs (see Bafus v Aspen Realty, Inc., 2007 WL 793633, 2007 US Dist LEXIS 18922 [D Idaho 2007]; Mercado v Playa Realty Corp., 2005 US Dist LEXIS 14895 [ED NY 2005]; Bloom v Martin, 865 F Supp 1377 [ND Cal 1994]; Campbell v Machias Sav. Bank, 865 F Supp 26 [D Maine 1994]; Morrison v Brookstone Mortg. Co. Inc., 415 F Supp 2d 801 [SD Ohio 2005]; Byrd v Homecomings Financial Network, 407 F Supp 2d 937 [ND Ill 2005]; Reese v 1st Metro. Mortgage Co., 2003 WL 22454658, 2003 US Dist LEXIS 19256 [D Kan 2003]; Collier v Home Plus Associates, Ltd., 18 Misc 3d 1121[A] [2007]; see also Sturm v Peoples Trust & Savings Bank, 713 NW2d 1 [Iowa 2006]; cf. Vega v First Federal Sav. & Loan Assn. of Detroit, 622 F2d 918, 925 n 8 [6th Cir 1980]). The sixth affirmative defense and the fourth counterclaim asserted by defendants Haley are dismissed.

As a seventh affirmative defense and fifth counterclaim, defendants Haley allege that plaintiff violated General Business Law § 349. General Business Law § 349 prohibits deceptive business practices and acts. An affirmative defense or a cause of action for deceptive business practices under General Business Law § 349 must include an allegation of a consumer-oriented act or practice that is misleading in a material way which causes injury to the party seeking relief (see Stutman v Chemical Bank, 95 NY2d 24, 29 [2000]). An act is deceptive if it is likely to mislead a reasonable consumer acting reasonably under the circumstances (see Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d 20, 26 [1995]). The act need not constitute common-law fraud to be actionable (see Stutman v Chemical Bank, 95 NY2d 24, 29 [2000], supra).

Defendants Haley allege that plaintiff, the mortgage broker and others engaged in unsatisfactory lending practices in the offering and closing of the subject mortgage loan. Plaintiff allegedly failed to consider their repayment ability and inform defendants Haley they were not qualified for the loan, provide them with a good faith estimate of the charges in relation to the loan, provide them with copies of their loan application, disclosure statements, a consumer handbook on adjustable rate mortgages, the

loan documents, and a notice informing them of their right to cancel. Although an individual mortgagor who has been the victim of misleading practices by a mortgagee has been held to have a remedy under General Business Law § 349 (see e.g. Popular Financial Services, LLC v Williams, 50 AD3d 660 [2008]; Delta Funding Corp. v Murdaugh, 6 AD3d 571 [2004]), in this instance, defendants Haley played a role in inducing plaintiff to make the loan. Furthermore, they have failed to show that plaintiff knew of their financial inability to repay the loan, or that a reasonable consumer would have entered, as they purportedly did, into a loan transaction without knowing the interest rate, and other terms and conditions, and most specifically, whether he or she could make the payments. In addition, to the extent HOEPA, TILA and RESPA require disclosures by a lender to a borrower who is seeking to refinance a mortgage in connection with residential real estate, again, defendants Haley have failed to demonstrate such statutes are applicable to the mortgage loan herein.

As an eighth affirmative defense and sixth counterclaim, defendants Haley assert that plaintiff, mortgage brokers and others violated Banking Law § 598 in connection with the offering, issuance and closing of the mortgage loan. Defendants Haley, however, make no claim that plaintiff is unlicensed or unregistered and is not specifically exempted from being unlicensed or unregistered. In addition, although the statute provides for "liquidated damages" or "quadruple damages," it makes no provision for rescission as a remedy for violation of the section. In addition, defendants Haley have failed to demonstrate the existence of a cause of action to recover damages for fraud (see Glassman v Zoref, 291 AD2d 430 [2002]).

To the extent defendants Haley assert that a defense exists founded upon documentary evidence, they have failed to present any such documents in opposition to the motion. The tenth affirmative defense is dismissed.

The eleventh and fourteenth affirmative defenses based on the claim by defendants Haley that any damages suffered by plaintiff are the proximate result of plaintiff's own actions or omissions does not constitute a defense to this mortgage foreclosure action. The concept of apportioning culpable conduct is one related to tort. Since the claims asserted by plaintiff in this case sound in breach of contract, as opposed to tortious conduct, an affirmative defense based on a notion of culpable conduct is unavailable herein (see CPLR 1401; Pilweski v Solymosy, 266 AD2d 83 [1999]; Nastro Contracting Inc. v Agusta, 217 AD2d 874 [1995]; Schmidt's Wholesale, Inc. v Miller & Lehman

Const., Inc., 173 AD2d 1004 [1991]; Castleton Holding Corp. v Forde, 15 Misc 3d 1111[A] [2007 NY Slip Op 50585U [2007]]).

The twelfth and thirteenth affirmative defenses asserted by defendants Haley based upon waiver and estoppel are also unsupported by any factual allegations or proof (see Glenesk v Guidance Realty Corp., 36 AD2d 852 [1971], supra; see also City of New York v Grosfeld Realty Co., 173 AD2d 436 [1991]; Flintkote Co. v Bert Bar Holding Corp., 114 AD2d 400 [1985]). They too are dismissed.

With respect to the ninth affirmative defense asserted by defendants Haley based upon usury, since December 1, 1980, the interest rate ceiling for loans under New York State law is 16% per annum (General Obligations Law § 5-501; Banking Law 14-a; see e.g. Cohen v Eisenberg, 265 AD2d 365 [1999]; Stanley Weisz, P. C. Retirement Plan v NCHD Assocs., 237 AD2d 276 [1997]). Thus, an interest rate exceeding 16% is usurious on its face unless the lender is exempted from usury limitations (see Cohen v Eisenberg, 265 AD2d at 366; 1 Bergman on New York Mortgage Foreclosures § 6.05). In those instances where the loan calls for a variable rate of interest, the interest charged may not be averaged over the term of the loan in determining whether a usurious rate has been charged (see Norstar Bank v Pickard and Anderson, 140 AD2d 1002 [1988]).

The mortgage herein calls for payment of interest pursuant to the underlying note, and the note calls for payment of an initial interest rate of 10.400% per annum and a variable rate thereafter, and allows for a maximum interest rate of 16.400% per annum to be charged, which is in excess of the legal rate authorized by section 5-501 of the General Obligations Law. Because plaintiff's motion is, in effect, for summary judgment dismissing the answer, plaintiff must establish as a threshold matter that it qualifies for an exemption from New York State's usury laws (see Cohen v Eisenberg, 265 AD2d at 367). Plaintiff has failed to meet such threshold (see id.; MIN Computer Consultants, Inc. v Gold, [Sup Ct, Suffolk County, April 2, 2002, Costello, J., index No. 31716/2000]).

Defendants Haley seek punitive damages as a seventh counterclaim. A demand or request for punitive damages possesses no viability absent its attachment to a substantive cause of action (see Rocanova v Equitable Life Assur. Soc. of U.S., 83 NY2d 603, 616 [1994]; see also Rose Lee Mfg., Inc. v Chemical Bank 186 AD2d 548, 550 [1992]). Defendants Haley have not established a related claim upon which punitive damages may be granted.

The eighth counterclaim asserted by defendants Haley is for an award of attorneys' fees. The rule is well settled in this state that the successful party in litigation may not recover attorneys' fees, except where authorized by the parties' agreement, statutory provision or court rule (see U.S. Underwriters Ins. Co. v City Club Hotel, LLC, 3 NY3d 592, 597-98 [2004]; Chapel v Mitchell, 84 NY2d 345, 349 [1994]; Mighty Midgets v Centennial Ins. Co., 47 NY2d 12, 21-22 [1979]). Defendants Haley have failed to establish a predicate for such relief. The eighth counterclaim is dismissed.

Those branches of the motion by plaintiff seeking summary judgment dismissing the first, second, third, fourth, fifth, sixth, seventh, eighth, tenth, eleventh, twelfth, thirteen and fourteenth affirmative defenses, and the counterclaims asserted by defendants Haley are granted. That branch of the motion for summary judgment dismissing the ninth affirmative defense asserted by defendants Haley based upon usury is denied.

Based upon the foregoing the motion for summary judgment is denied, and the appointment of a referee is deemed premature at this juncture.

Dated: June 11, 2009

---

J.S.C.