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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS Part 19
Justice

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THAI TRANG, on behalf of himself and all others similarly situated,

Plaintiff,

-against-

HSBC MORTGAGE CORPORATION, USA, HSBC BANK USA, INC. and HSBC USA, INC.,

Defendants.

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Index No: 20810/01
Motion Date: 2/6/01
Motion Cal. Number: 31 & 32

The following papers numbered 1 to 17 read on this motion for an order granting defendants summary judgment dismissing plaintiff's complaint on the ground that plaintiff's claims are without merit [Calendar No. 31]. Plaintiff moves for an order declaring that this action be maintained as a class action [Calendar No. 32].

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits-Memorandum of Law.....	1 - 5
Notice of Motion-Affidavits-Exhibits-Memorandum of Law.....	6 - 10
Answering Affidavits-Memoranda of Law.....	11 - 15
Reply Memorandum of Law.....	16 - 17

Upon the foregoing papers, it is ordered that the motions are disposed of as follows:

This is an action brought by plaintiff, former mortgagor of defendants, seeking redress for himself, and the class of people similarly situated, for business practices of defendants pertaining to mortgage satisfactions, which are allegedly violative of Real Property Law § 274-a and General Business Law § 349.[1] Plaintiff alleges that in contravention of the law, defendants charged a $15.00

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[1]RPL § 274-a states, in pertinent part that : (2) the mortgagee of an owner-occupied, one to six family residential structure or residential condominium unit, shall deliver within thirty days, any mortgage related documents to an authorized individual making a bona fide written demand
for such documents. The mortgagee shall not charge for providing the mortgage-related documents, provided, however, the mortgagee may charge not more than twenty dollars, or such

"special handling/fax fee" for a faxed copy of an initial mortgage payoff statement. Thus, plaintiff moves for an order declaring that: 1) this action be maintained as a class action consisting of all persons within the applicable statute of limitations who were New York State residents and owner-occupiers of one-to-six family residential structures whose mortgage loans were serviced by defendants or its affiliates, who were charged a "fax fee" in connection with the satisfaction of their mortgages; 2) plaintiff be designated as the representative of the class for this consumer class action; and 3) plaintiff's counsel be designated as class counsel. Defendants move for summary judgment dismissing plaintiff's complaint on the ground that plaintiff's claims are without merit.

It is well settled that summary judgment should be granted only when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 NY2d 223, 231; Andre v. Pomeroy, 35 NY2d 361, 364; Taft v. New York City Tr. Auth., 193 AD2d 503, 505. As such, the function of the court on the instant motion is issue finding and not issue determination. See, Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404; D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 AD2d 668, 669. The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 NY2d 557, 562. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

Here, defendants state, among other things, that the fax fee does not violate RPL § 274-a because defendants only charged a fee if the mortgage pay-off statement was requested by facsimile. Defendants contend that a borrower could obtain a mailed copy of the statement free of charge. Defendants further contend that the fax fee does not contravene GBL § 349 because it is their policy to notify the borrower of the fax fee at the time that a mortgage pay-off statement is requested by facsimile. Therefore, defendants contend that as plaintiff's claims are without merit, defendants are entitled to summary judgment and the motion should be dismissed. This Court disagrees.

"Insofar as [RPL § 274-a] commands, '[t]he mortgagee shall not charge for providing the mortgage-related documents' (Real Property Law § 274-a [2] [a]), this language constitutes an unambiguous expression of Legislative intent not subject to any contrary interpretation (see McKinney's Cons Laws of NY, Book 1, Statutes § 94). Words and phrases in a statute are to be given their ordinary meaning (see People v Cruz, 48 NY2d 419), and the words 'shall not charge'

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amount as may be fixed by the banking board, for each subsequent payoff statement provided under this subdivision.

(Continued....)

GBL § 349, states, in pertinent part that: (a) Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.

can only reasonably be read to prohibit any delivery fee, even by fax." Negrin v. Norwest Mortg., Inc.
263 A.D.2d 39, 45. Moreover, General Business Law § 349(a), enacted to protect consumers, prohibits businesses from employing any deceptive practices in the conduct business. "The essential elements of a cause of action alleging consumer fraud in violation of General Business Law § 349 are that the defendant engaged in a consumer-oriented misleading practice and that the plaintiff was injured thereby (see New York Univ. v.Continental Ins. Co.; Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20, 623 N.Y.S.2d 529, 647 N.E.2d 741; Teller v. Bill Hayes, Ltd., 213 A.D.2d 141, 630 N.Y.S.2d769). Id. at 48.

Accordingly, as defendants' arguments in support of summary judgment are unavailing, and plaintiff has stated causes of action insofar as he has alleged that the imposition of the fax fee violated the statutory provisions of Real Property Law § 274-a and General Business Law § 349, this Court finds that defendants' are not entitled to summary judgment, and the motion is hereby denied. The other arguments set forth by defendants in support of their motion are either inapplicable or without merit, and are equally unavailing.

With respect to plaintiff's motion for an order declaring that this action be maintained as a class action, CPLR § 901, provides in pertinent part:

> One or more members of a class may sue or be sued as representative parties on behalf of all if the class is so numerous that joinder of all members, ...is impracticable; there are questions of law or fact common to the class which predominate over any questions affecting only individual members; the claims or defenses of the representative parties are typical of the claims or defenses of the class; the representative parties will fairly and adequately protect the interests of the class; and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

"The determination to grant class action certification is one resting in the sound discretion of the trial court (see CPLR 901 [a]; Lauer v New York Tel. Co., 231 AD2d 126, 130). Generally, CPLR article 9 is to be liberally construed and any error should be resolved in favor of allowing the class action (see Lauer v New York Tel. Co., at 130; Pruitt v Rockefeller Ctr. Props., 167 AD2d 14, 21; Friar v Vanguard Holding Corp., 78 AD2d 83)." Liechtung v. Tower Air, Inc., 269 A.D.2d 363, 364. As the Court needs to determine the propriety of the request for class certification, plaintiff's motion is set down for a hearing before this Court on Wednesday, May 15, 2002, at 10:30 a.m. All issues with respect to class certification shall be determined at such time.

Dated: April 9, 2002

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J.S.C.