

Roebuck v Countrywide Home Loans, Inc.
2005 NY Slip Op 30604(U)
May 6, 2005
Supreme Court, New York County
Docket Number: 108604/04
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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GERARD ROEBUCK

Plaintiff,

Index No.: 108604/04

**DECISION and
ORDER**

-against-

COUNTRYWIDE HOME LOANS, INC.,

Defendant.

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KORNREICH, SHIRLEY WERNER, J.:

This is an action to recover for alleged breach of contract and violation of 11 N.Y.R.C.C. 420, in connection with a loan agreement entered into by the parties. Plaintiff's complaint alleges as follows: In 1993, he purchased certain "improved real estate" in Stone Mountain, Georgia (the "Property"). Cmpl't, para. 5. Plaintiff took out a first mortgage on the property in the amount of \$140,000, by executing a note in favor of Bancboston Mortgage Corporation ("Bancboston"). Id. at para. 6. Bancboston thereafter assigned the note to defendant Countrywide Home Loans, Inc ("Countrywide"). Id. at para. 9. Plaintiff took out a second mortgage on the Property in the amount of \$35,000. Subsequently, in a complicated series of events, plaintiff was notified by one "Major Everett," on behalf of Osmond Consulting LLC ("Osmond") that Osmond had purchased plaintiff's second mortgage, and was planning to sell the Property in a foreclosure sale on January 7, 2003. Id. at para. 11. Plaintiff responded by filing a petition for Chapter 13 bankruptcy in the United States District Court for the Southern District of New York. Id. at para. 15. Nevertheless, Osmond sold the Property on January 7,

2003 to itself for \$72,100. Id. at 16. On February 13, 2003, the Bankruptcy court granted Osmond relief from the stay with respect to the Property, and then annulled the stay on April 8, 2003. Id. at 18-19.

“On June 10, 2003, Countrywide sent its monthly statement to plaintiff, which “included a prior year escrow review and acknowledgment of [plaintiff’s] Chapter 13 status.” Id. 21. Countrywide then sought relief from the bankruptcy stay in order to foreclose on the Property. Id. at 24. “On August 7, 2003, after a hearing, the Bankruptcy Court ordered that [plaintiff’s] property be returned to him.” Id. at 27. On the same day, plaintiff spoke to a representative of Countrywide, one “Mariscal,” who told him that Countrywide knew of his bankruptcy status, and would not give “third parties information on [plaintiff’s] loan” or “accept any payoff from third parties.” Id. at 28. Nevertheless, on August 26, 2003, Countrywide accepted payoff of the loan from Osmond and/or Everett. Id. at 31. Mariscal told plaintiff that the pay off was a “terrible mistake.” Id. at 33. Countrywide’s lawyers said the sale “should never have happened.” Id. Still, on September 25, 2003, Countrywide opposed plaintiff’s bankruptcy plan, claiming that plaintiff was in arrears on his home loan in the amount of \$5,816.26. Id. at 35. Countrywide moved for dismissal of plaintiff’s bankruptcy case, which was granted, and the case was dismissed with prejudice on November 6, 2003. Id. at para. 41.

The Security Deed that forms the basis of plaintiff’s action provides, in pertinent part:

If Borrower fails to perform the covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect Lender’s rights in the Property (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture or to enforce laws or regulations), then Lender may do and pay for whatever is necessary to protect the value of the Property and Lender’s rights in the Property. Lender’s actions may

include paying any sums secured by a lien which has priority over this Security Instrument, appearing in court, paying reasonable attorneys' fees and entering on the Property to make repairs. ...

The Note or a partial interest in the Note (together with this Security Instrument) may be sold one or more times without prior notice to the Borrower. ...

Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument... .

Affirmation of A. Leonard, Exhibit B.

Motion to Dismiss

Countrywide now moves pursuant to CPLR 327, 1001 and 3211(a)(1), (3), (7) and (10) for an order dismissing plaintiff's complaint. Countrywide submits the affidavit of Devra Lindgren, its Assistant Secretary, the Affirmation of its attorney, together with copies of pleadings, mortgage documents, and other documentary evidence. In opposition, plaintiff submits the affirmation of his attorney, together with copies of the Loan Modification Agreement and Security Deed.

Conclusions of Law

The Court's task in a CPLR 3211 motion to dismiss is "to determine whether plaintiffs pleadings state a cause of action." 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144 (2002). In making its determination, the Court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). Accord Campaign for Fiscal Equity, Inc. v. State of N.Y., 86 N.Y.2d 307, 318 (1995). For the reasons that follow, the Court concludes that plaintiff's complaint fails to state a cause of action. The Court need not, and therefore does not,

reach the issues raised under CPLR 327 and 1001.

Plaintiff's first cause of action is for violation of 11 NYRCC 420. That section, entitled Privacy of Consumer Financial and Health Information, "governs the treatment of nonpublic personal information about individuals (defined in this Part as consumers or customers) in this State by all licensees of the Insurance Department." 11 NYCRR § 420.1. A "licensee" is defined as

a person licensed, or required to be licensed, or authorized, or required to be authorized, or registered, or required to be registered pursuant to the Insurance Law of this State; a health maintenance organization holding, or required to hold, a certificate of authority pursuant to Article 44 of the Public Health Law; or an unauthorized insurer in regard to the excess line business conducted pursuant to section 2118 of the Insurance Law and Part 27 of this Title (Regulation 41).

11 NYCRR § 420.3(p).

Plaintiff's complaint does not allege that Countrywide is a licensee under 11 NYCRR § 420. Nor does he so argue in his opposition papers. Countrywide's Assistant Secretary avers that "Countrywide Home Loans is a mortgage company engaged in the business of originating and servicing home mortgage loans." Affidavit of D. Lindgren, para. 3. According plaintiff every favorable inference, the Court concludes that he has failed to allege facts sufficient to establish that Countrywide is a "licensee" under 11 NYCRR § 420. Therefore, plaintiff's first cause of action must be dismissed.

Plaintiff's second cause of action is for breach of contract due to "Defendant's acceptance of the payoff on [plaintiff's] First Mortgage from nonaffiliated third parties, without [his] consent or knowledge." Cmplt, para. 46. Defendant does not dispute that it accepted the payoff.

However, the Security Deed provided that the mortgage and note could be sold without notice to plaintiff. Plaintiff does not dispute this. He argues, instead, that Countrywide breached the acceleration provision by accepting the payoff without providing him notice. The Court disagrees. In interpreting a contract, the Court must give the words and phrases used by the parties their "plain meaning." Brooke Group v. JCH Syndicate 488, 87 N.Y.2d 530, 534 (1996). The acceleration provision requires notice to the borrower where Countrywide seeks to accelerate payment of the loan due to the borrower's default. Here, Countrywide did not seek to accelerate payment; Countrywide merely exercised its right under the contract to sell the loan to a third party. By the terms of the Security Deed, no notice was required. Therefore, plaintiff's second cause of action must be dismissed.

Plaintiff's third, and last, cause of action seeks compensation for "severe emotional stress and injury" allegedly caused by Countrywide's termination of the first mortgage. As discussed above, plaintiff has failed to state a cause of action under either legal theory advanced in the complaint. Therefore, plaintiff has no basis upon which to recover for his emotional distress.

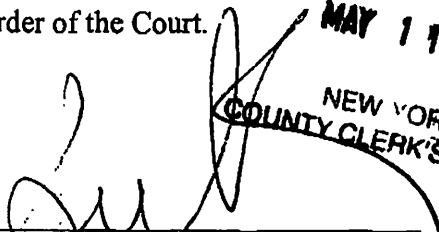
Accordingly, it is

ORDERED that defendant's motion is granted and the action is dismissed.

The foregoing constitutes the decision and order of the Court.

FILED
MAY 11 2005
 NEW YORK
 COUNTY CLERK'S OFFICE

Date: May 6, 2005
 New York, New York



 SHIRLEY WERNER KORNEICH