

<b>Terwin Advisors LLC v Ideal Mortgage Bankers, Ltd.</b>
2006 NY Slip Op 30617(U)
August 2, 2006
Sup Ct, NY County
Docket Number: 604386/05
Judge: Bernard J. Fried
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**BERNARD J. FRIED**  
J.S.C.

Index Number : 604386/2005

TERWIN ADVISORS LLC

vs  
IDEAL MORTGAGES BANKERS LTD

Sequence Number : 001

SUMMARY JUDGMENT

**FBEM** PART 60

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

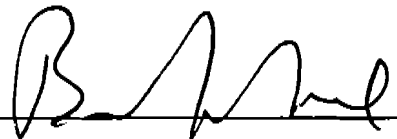
Upon the foregoing papers, It is ordered that this motion

**FILED**  
AUG 02 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

This motion is decided in accordance with the attached memorandum decision.

SO ORDERED

Dated: 8/21/06

  
J.S.C.

**BERNARD J. FRIED**

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 60

**FBEM**

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TERWIN ADVISORS LLC,

Index No. 604386/05

Plaintiff,

- against -

IDEAL MORTGAGE BANKERS, LTD.,  
d/b/a LEND AMERICA,

Defendant.

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**APPEARANCES:**

For Plaintiff:

For Defendant:

Miller & Wrubel P.C.  
250 Park Avenue  
New York, New York 10177  
(Richard F. Harrison, Esq.)

Phillips Nizer LLP  
600 Old Country Road  
Garden City, NY 11530  
(Charles R. Jacob III, Esq.,  
Jeremy R. Sher, Esq.)

**FRIED, J.:**

Plaintiff Terwin Advisors LLC (Terwin) moves for summary judgment (CPLR 3212) as to liability on its first cause of action against defendant Ideal Mortgage Bankers, Ltd., d/b/a Lend America (Lend America), and for an order directing the amount of damages to be determined by a referee (CPLR 4317 [b]). Terwin additionally moves for summary judgment (CPLR 3212) on its second cause of action and for entry of judgment in the amount of \$61,448.30.

This action arises out of Lend America's alleged breach of its mortgage loan repurchase obligations under an agreement (Purchase Agreement) with Terwin. Under the

Purchase Agreement, Lend America was contractually bound to repurchase from Terwin certain mortgage loans in the event of borrower delinquency (Default Loans) within 90 days of their transfer from Lend America to Terwin.<sup>1</sup>

Terwin alleges that in late 2005, it notified Lend America of 11 such loans purchased from Lend America which qualified as Default Loans, and demanded their repurchase (Terwin's Rule 19-a Statement, ¶¶ 2-10; Affirmation of Charles R. Jacob III, Exhibit A, § 3.05). It is undisputed that Lend America did not repurchase the Default Loans, which failure Terwin maintains is a breach of the Purchase Agreement.

Terwin additionally alleges the breach of a provision in the Purchase Agreement wherein Lend America agreed to pay Terwin a certain amount for mortgage loans Lend America previously sold to it, in the event that the loan balances were paid in full by the borrowers during a specified period of time from their original purchase (Terwin's Rule 19-a Statement, ¶¶ 11-12; Affirmation of Charles R. Jacob III, Exhibit A, § 3.06). According to Terwin, it demanded payment for certain prepaid mortgage loans, but Lend America refused payment.

Following Lend America's refusal to repurchase the Default Loans and pay Terwin for the prepaid mortgages, Terwin commenced this action for breach of contract and for indemnification. Lend America is not opposing the second cause of action for

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1

Section 3.05 of the Purchase Agreement states that in the event a mortgagor is delinquent for 30 or more days in its first three monthly payments due on the mortgage immediately following closing, Lend America, at Terwin's option, "shall promptly repurchase such [m]ortgage [l]oan from the Purchaser [Terwin] within five . . . [d]ays' of receipt of written notice from" Terwin (Affirmation of Charles R. Jacob III, Exhibit A, § 3.05).

reimbursement of prepaid mortgages (Lend America, Memorandum of Law, at 1). According to Lend America, it set aside \$100,000 in reserve in anticipation of satisfying this cause of action (Affidavit of Helene Decillis, ¶ 3). During oral arguments held on this motion, both parties agreed to attempt to reach an agreement as to satisfaction of this claim (Transcript, at 18-19). Accordingly, the court will not address it.

For the reasons stated below, Terwin's motion for summary judgment is denied as to the first cause of action due to material issues of fact concerning whether the 11 loans at issue were actually delinquent within the meaning of the Early Default provision of the Repurchase Agreement.

In support of its motion for summary judgment for breach of the Early Default provision, Terwin maintains that it is entitled to judgment based upon its demonstration of Lend America's contractual payment obligation and undisputed failure to tender payment upon demand. Lend America does not dispute the enforceability of the Purchase Agreement nor its obligations thereunder to repurchase loans from Terwin in the event of Early Default. Rather, Lend America opposes summary judgment on the ground that material issues of fact remain as to whether the borrowers of the loans identified by Terwin as Early Default were actually delinquent in light of the failure of Terwin's servicing agent, Specialized Loan Servicing (SLS), to timely and accurately credit borrowers' payments made to Terwin during the first 90 days of its ownership of the loans.<sup>2</sup>

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<sup>2</sup>

According to Lend America, Terwin outsourced the servicing of its loans to SLS, a wholly owned affiliate of Winter Group, which is also the parent of Terwin (Affidavit of Helene Decillis, ¶ 31).

According to Lend America, SLS's failure to timely credit payments made by borrowers resulted in the transmittal of delinquency notices, thereby triggering Lend America's contractual loan repurchase obligations, where, in actuality, payments on the loans were timely made. In opposition to the motion, Lend America submits affidavit testimony from an account and service manager from Lend America. She maintains that in her review of 762 loans sold by Lend America to Terwin during the period from January of 2004 to December of 2005 and serviced by SLS, payments made on approximately 77 loans were routinely not credited in a timely manner by SLS, resulting in "innumerable instances in which [b]orrowers have made payment and have subsequently been told that they are delinquent" during the first 90 days of their transfer to Terwin (Affidavit of Nicole Giuliano, ¶ 3; *see also* Affidavit of Helene Decillis, ¶ 43). The most common problem she observed in the reviewed loans was with SLS's chronic failure to properly "board" its customers (Affidavit of Nicole Giuliano, ¶ 4). "Boarding" is an industry term for the process by which a lender timely incorporates data on new borrowers and alerts them whenever the mortgage is transferred to another servicing agent (*id.*, ¶ 4). Such notification, termed a "goodbye letter," serves to inform the borrower of the servicing transfer and that the next scheduled payment is to be remitted to a different designated address (*id.*, ¶ 5). Additionally, the new servicing agent typically sends a "hello letter," which serves to advise the borrower where and when to remit payments (*id.*).

To demonstrate SLS's failure to timely board new borrowers, Lend America submits affidavit testimony from several borrowers who each state that SLS failed to credit payments made on their loans, resulting in incorrect delinquencies on their accounts, in addition to

claiming that SLS did not notify them when their account had been transferred. One affiant, Ilene Springer, a borrower whose mortgage is among those Terwin is demanding that Lend America repurchase due to Early Default, testified that subsequent to closing on the loan, she received a notification that the loan had been sold by Lend America and was directed to send payments to SLS, who was to service the loan (Affidavit of Ilene M. Springer, ¶ 5). While continuing to make on-time scheduled payments to SLS, the affiant testified that she received a delinquency notice from another mortgage servicing agent, called Countrywide, despite never having received a “goodbye letter” from SLS, notifying her that the loan had again been transferred (*id.*, ¶ 8).<sup>3</sup>

Furthermore, Lend America submits memoranda for three different loans which Lend America sold to Terwin which contain notations allegedly written by Terwin employees as to “boarding issues” with the loans, purportedly to demonstrate that Terwin was aware of boarding problems with these particular loans (Affidavit of Nicole Giuliano, Exhibits 1-3).

Finally, as for the 11 loans at issue in this action, Lend America asserts that its opposition to the present action has been curtailed by its inability to depose the 11 borrowers, whose loans Terwin alleges qualify as Early Default loans, to question them regarding whether payments made on their loans were timely credited, in addition to whether boarding procedures were followed in the servicing of their loans (Transcript, at 22).

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<sup>3</sup>

While Terwin did submit SLS servicing histories of 10 of the 11 loans it claims qualify as Early Default loans in support of its motion, the servicing history of the Springer loan was not submitted (*see* Exhibit C, Annexed to the Affirmation of Charles R. Jacob III, Esq.).

Lend America's submission of affidavit testimony alleging the frequent failure on the part of Terwin's servicing agent, SLS, to timely credit mortgage payments made by borrowers in addition to an affidavit from a borrower whose mortgage Terwin maintains qualifies as an Early Default loan testifying to the same, is sufficient to raise a triable issue of fact (*Goldston v Bandwidth Technology Corp.*, - AD3d-, 817 NYS2d 265 [1<sup>st</sup> Dept 2006]; *see also Baez v Rahamatali*, 24 AD3d 256, 258 [1<sup>st</sup> Dept 2005], *affd* 6 NY3d 868 [2006] [the court's proper function on a motion for summary judgment is issue finding and not issue resolution]). Moreover, Lend America's inability to depose the 11 borrowers whose loans Terwin identified as Early Default, renders this motion, filed only one month after joinder of issue (Transcript, at 23), premature.

Accordingly, it is

ORDERED that so much of the motion as seeks summary judgment for the first cause of action is denied; and it is further

ORDERED that so much of the motion as seeks summary judgment on the second cause of action is denied without prejudice and with leave to renew.


Dated: August 2, 2006

ENTER:

**FILED**

AUG 02 2006

NEW YORK  
COUNTY CLERK'S OFFICE



J.S.C.

**BERNARD J. FRIED**  
J.S.C.