

Rosenzweig v Givens
2007 NY Slip Op 32132(U)
July 11, 2007
Supreme Court, New York County
Docket Number: 0114693/2005
Judge: Barbara Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

BARBARA R. KAPNICK

PRESENT: BARBARA R. KAPNICK J.S.C.
J. Justice

PART 12

Index Number : 114693/2005

ROSENWEIG, JOSEPH I.

INDEX NO. 114693/05

vs
GIVENS, RADIAH H.

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. 001

_____ motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

Settle Order

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

Dated: 7/11/07

[Signature]
BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

-----X

JOSEPH I. ROSENZWEIG,

Plaintiff,

-against-

RADIAH H. GIVENS,

Defendant.

-----X

BARBARA R. KAPNICK, J.:

DECISION
Index No. 114693/05
Motion Seq. No. 001

In this action, plaintiff Joseph I. Rosenzweig seeks to foreclose on two mortgage loans purportedly made to defendant Radiah H. Givens on or about May 10, 2002.

Background

The first mortgage was in the amount of \$50,000.00 and the second mortgage was in the amount of \$235,300.00. Both loans were to be repaid at an interest rate of 7.5% per year with payments of interest only until June 1, 2012, when all principal and accrued interest would become due.

Plaintiff claims that defendant failed to make any of the required payments and was thus in default on her obligations under both mortgages as of August 25, 2005.

Plaintiff then elected to enforce an acceleration clause in the mortgages in order to make the entire principal sum with interest thereon be due immediately. See, e.g., Mariash v. Bastianich, 88 A.D.2d 829 (1st Dep't 1982). Defendant did not repay either loan and plaintiff thereafter commenced this action.

However, defendant, who describes herself "as a young student, with limited financial resources," claims that plaintiff (who is an attorney) lied to her "that he was buying an Apartment for me as a gift; fraudulently induced me to sign a Purchase Agreement for the Apartment for \$317,000, when he knew that, as a student, I did not have the financial resources to do so, or to pay the monthly maintenance, household and related charges - he set me up to defraud me".

She further claims that he fraudulently induced her

to believe that the documents we both signed at the Closing were necessary to put title in my name as his gift, which was also a lie; he never advised me before the Closing that he was lending me money and that I was signing mortgage instrument, which imposed obligations on me to pay him to the extent of \$285,300, which he knew I could never afford to pay.

In addition, defendant claims that plaintiff "selected a lawyer friend of his to represent us both at the Closing to induce me to believe that the transactions taking place were as he had fraudulently represented them to me to be".

Defendant also claims that plaintiff concealed from her

that monthly payments were due him under the "mortgages", by not asking me to pay them for over three years. He never told me that I had to pay initial interest payments to him at the Closing, for which I was never asked to issue checks, nor did I, nor did I sign any document authorizing payment to him. ...

In addition, defendant claims that plaintiff "forged or caused my name to be forged on a loan application for a mortgage loan to be secured by the Apartment, without my knowledge or consent, in an attempt to impose a \$150,000 debt obligation on me".

Finally, defendant claims that plaintiff "fraudulently represented himself as a bachelor and signed an official marriage register in Jamaica to that effect".

Based on these allegations, defendant has asserted in her Answer affirmative defenses that: (i) plaintiff's claims are barred by his unconscionable conduct and fraudulent representations (first affirmative defense); (ii) plaintiff waived and is estopped from making claims under the first and second mortgages (second affirmative defense); (iii) plaintiff's claims are barred by his bad faith and his course of dealing with defendant (third affirmative defense); and (iv) plaintiff's Complaint fails to state a claim upon which relief can be granted (fourth affirmative defense).

Defendant has also asserted counterclaims seeking: (i) compensatory damages stemming from her marriage to plaintiff;¹ and (ii) rescission of the two mortgages, together with compensatory and punitive damages arising out of plaintiff's alleged unconscionable conduct, fraud, malice, wantonness and recklessness.

Plaintiff now moves for an order:

(i) granting summary judgment and entering a judgment of foreclosure and sale against the defendant together with costs and attorneys' fees;

(ii) striking defendant's first, second and third affirmative defenses;

(iii) dismissing defendant's first and second counterclaims for failure to state a cause of action; and

(iv) striking defendant's request for an award of punitive damages against plaintiff.

Discussion

Plaintiff has established his prima facie entitlement to judgment against the defendant "by submission of the mortgage and unpaid note with the [defendant's] signature on them, and evidence of default, thereby shifting the burden to the [defendant] to raise

¹ There is no dispute that plaintiff was married to another woman at the time of his marriage to defendant. During the pendency of this case, the marriage between plaintiff and defendant was annulled by Order of the Hon. Lottie E. Wilkins.

a triable issue of fact" Cochran Investment Co., Inc. v. Jackson, 38 A.D.3d 704, 705 (2nd Dep't 2007). See also, Bank Leumi Trust Co. of New York v. Lightning Park, Inc., 215 A.D.2d 246 (1st Dep't 1995); Chemical Bank v. Broadway 55-56th St. Associates, 220 A.D.2d 308 (1st Dep't 1995).

Thus, in order to defeat plaintiff's motion for summary judgment, defendant must successfully

assert any defenses which would raise a question of fact about [her] default on the mortgage (citations omitted), such as "waiver by the mortgagee, or estoppel, or bad faith, fraud, oppressive or unconscionable conduct on the latter's part" (Nassau Trust Co. v. Montrose Concrete Prods. Corp., 56 N.Y.2d 175, 183, ...[1982], quoting Ferlazzo v. Riley, 278 N.Y. 289...[1938]).

North Fork Bank v. Hamptons Mist Management Corp., 225 A.D.2d 596, 597 (2nd Dep't 1996).

First affirmative defense/Second counterclaim

Defendant alleges as her first affirmative defense that plaintiff should be barred from bringing this action based on his unconscionable conduct and fraudulent representations.

It is well settled that

[t]he doctrine of unclean hands applies when the complaining party shows that the offending party is "guilty of immoral, unconscionable conduct and even then only 'when the conduct relied on is directly related to

the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct" (citation omitted).

Kopsidas v. Krokos, 294 A.D.2d 406, 407 (2nd Dept. 2002).

However, "'a shadowy semblance of an issue or bald conclusory assertions, even if believable, are not enough' to defeat a motion for summary judgment (citations omitted)". Mayer v. McBrunigan Construction Corp., 105 A.D.2d 774 (2nd Dep't 1984).

Plaintiff argues that defendant has not met her burden in this case of demonstrating that he engaged in immoral, unconscionable conduct. Moreover, plaintiff argues that defendant cannot demonstrate that she reasonably relied on any representations he made since defendant voluntarily signed the mortgages.

It is well settled that "[a] party that signs a document is conclusively bound by its terms absent a valid excuse for having failed to read it" Guerra v. Astoria Generating Co., L.P., 8 A.D.3d 617, 618 (2nd Dep't 2004). See also, Fleet Capital Leasing/Global Vendor Finance v. Anqiuli Motors, Inc., 15 A.D.3d 535 (2nd Dep't 2005); Goldberg v. Manufacturers Life Insur. Co., 242 A.D.2d 175 (1st Dep't 1998), lv. to app. dismiss'd in part, denied in part, 92 N.Y.2d 1000 (1998); Blog v. Battery Park City Authority, 234 A.D.2d 99 (1st Dep't 1996); Sofio v. Hughes, 162

A.D.2d 518 (2nd Dep't 1990), lv. to app. denied, 76 N.Y.2d 712 (1990).

While a party may be excused from reading a document upon a showing of fraud or duress (Blog v. Battery Park City Authority, supra at 100), a mortgage may generally "not be set aside solely because the underlying transaction was tainted by a fraudulent representation" (Jo Ann Homes at Bellmore, Inc. v. Dworetz, 25 N.Y.2d 112, 122 [1969]; see also, Dyke v. Peck, 279 A.D.2d 841 [3rd Dep't 2001]).

In this case, defendant's claim that plaintiff told her to sign the mortgage without adequately advising her as to its meaning and legal consequences does not rise to the level of fraud (see, e.g., Davenport v. Holbert, 131 Misc. 511 [Sup. Ct., Madison Co. 1928]).

Moreover, although defendant alleges that plaintiff selected an attorney to induce her to believe that the legal ramifications of the mortgage instruments were as plaintiff had fraudulently represented them to her to be, there is no dispute that said attorney, Thomas L. Gazianis, Esq. also wrote a letter dated May 10, 2002 to both defendant and plaintiff stating as follows:

This is to confirm that you have both retained me, Thomas L. Gazianis, as your attorney. I am Ms. Givens' attorney with respect to the transfer of the referenced apartment from Richard and Madeleine Leaton, as Sellers, to Radiah K. Givens, as Purchaser. I am also Ms. Givens' attorney with respect to the First and Second Mortgage Loans being made to her by Joseph I. Rosenzweig, in the combined amount of \$285,300 and in connection with the mortgage and Note Ms. Givens has given to Mr. Rosenzweig therewith. I am also Mr. Rosenzweig's attorney in his capacity as lender and mortgagee with respect to the \$285,300 loan and mortgage referenced above. I have also worked with Joseph I. Rosenzweig before and have a friendship relationship with him.

You understand that I am representing both of you in connection with the loan transaction, so the potential for a conflict of interest exists should a dispute arise between you. Since my loyalties are divided two ways, I have advised both of you to obtain separate counsel.

Nevertheless, you have specifically refused to obtain such separate counsel and do hereby waive any claim you may have or may develop in the future with respect to any conflict of interest on my part.

The letter is signed "accepted and agreed to" by both defendant and plaintiff. Defendant has offered no explanation for her failure to consult another lawyer prior to signing the mortgage. See, Kopsidas v. Krokos, supra. Therefore, defendant is bound by the terms of the mortgage documents.

The first affirmative defense is accordingly dismissed. That portion of plaintiff's motion seeking to dismiss the second

counterclaim for rescission of the mortgage on the same grounds, together with damages, is likewise granted.²

Second affirmative defense

Defendant alleges as her second affirmative defense that plaintiff waived and is estopped from making claims under the subject mortgages because plaintiff never demanded that defendant make any payments over more than a three-year period.

It is well settled that "waiver is the voluntary abandonment or relinquishment of a known right, which, except for such waiver, the party would have enjoyed" (citation omitted). Waiver "may be accomplished by express agreement or by such conduct or failure to act as to evince an intent not to claim the purported advantage" (citation omitted). Furthermore, the question of whether waiver has occurred is generally a question left to the finder of fact (citation omitted).

Bono v. Cucinella, 298 A.D.2d 483, 484 (2nd Dep't 2002)

While it appears that the initial monthly payments were made on both mortgages at the closing by checks drawn on Mr. Gazianis' Special Account, there is no evidence that any further payments were made by Givens, nor does plaintiff claim that he demanded any payments from her following these initial payments.

² Defendant's request for punitive damages is dismissed for the further reason that the alleged conduct was focused on defendant and "not aimed systematically at the public generally." American Transit Insur. Co. v. Associated International Insur. Co., 261 A.D.2d 251 (1st Dep't 1999).

However, the Rider to both the first and the second mortgages contains the following provision:

26. The mortgagee's waiver of or acquiescence in any default by the mortgagor or the failure of the mortgagee to insist upon strict performance by the mortgagor of any terms, provisions, conditions, covenants or agreements in this mortgage shall not constitute a waiver of any subsequent or other default of the mortgagor. No waiver, change, modification or discharge in whole or in part of this mortgage, or of any obligation will be effective unless in writing signed by the mortgagee.

Such unambiguous non-waiver clauses are uniformly enforced. See, Awards.com, LLC v. Kinko's, Inc., A.D.3d, 834 N.Y.S.2d 147 (1st Dep't 2007); Crossland Savings, FSB v. Loguidice Chatwal Real Estate Investment Co., 171 A.D.2d 457 (1st Dep't 1991); Rodking Service Station, Inc. v. Gribin, 109 A.D.2d 873 (2nd Dep't 1985), app. discount'd, 65 N.Y.2d 925 (1985).

Thus, defendant has failed to raise a triable issue of fact as to waiver of plaintiff's rights under the subject mortgages and is foreclosed from asserting her second affirmative defense.

Third affirmative defense

Defendant alleges as her third affirmative defense that plaintiff's claims are barred by his bad faith and course of dealing with defendant because plaintiff knew that she lacked the

financial means to make the payments required under the mortgages or to pay the monthly maintenance and real estate taxes.

In addition, defendant claims that plaintiff failed to record the second mortgage until on or about July 7, 2005 and then only after defendant allegedly learned and advised plaintiff that he had forged or caused to be forged, on or about April 19, 2005, a bank related form for a separate \$150,000 mortgage loan to be secured by the Apartment.

Under New York law, a covenant of good faith and fair dealing is implied in all contracts (citations omitted). The implied covenant of good faith encompasses "any promises which a reasonable person in the position of the promisee would be justified in understanding were included" in the agreement, and prohibits either party from doing "anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (citations omitted).

1-10 Industry Associates, LLC v. Trim Corp. of America, 297 A.D.2d 630, 631 (2nd Dep't 2002). See also, Zuckerwise v. Sorceron, Inc., 289 A.D.2d 114 (1st Dep't 2001).

Defendant has failed to identify any such promises or action on the part of plaintiff which was included in the two mortgages signed by defendant. Therefore, that portion of plaintiff's motion seeking to dismiss defendant's third affirmative defense must be granted.


First counterclaim

Defendant seeks in her first counterclaim to recover damages for injuries she allegedly sustained as a result of her marriage to plaintiff. However, defendant has not identified any compensable damages which she suffered as a result of the marriage which was annulled on February 5, 2007. Therefore, that portion of the motion seeking to dismiss the first counterclaim must also be granted.

Accordingly, despite this Court's displeasure with plaintiff's behavior in this case, this Court is constrained to grant plaintiff's motion in its entirety.

Settle Order.

Dated: July //, 2007



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.