

Shovak v Long Is. Commercial Bank

2007 NY Slip Op 32760(U)

August 30, 2007

Supreme Court, Nassau County

Docket Number: 7102-04/

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X
JAMES SHOYAK on behalf of himself
And all others similarly situated,

Plaintiff,

-against-

MICHELE M. WOODARD, J.S.C.
Trial/IAS Part 18
Index No.: 17102/04
Motion Seq Nos.: 03 & 04

LONG ISLAND COMMERCIAL BANK,
Defendant.

DECISION & ORDER

-----X
Papers read on this Motion:

Defendants Notice of Motion	03
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The motion by the defendant Long Island Commercial Bank ("the Bank") to dismiss the plaintiff's complaint pursuant to CPLR §3211(a)(1), (7) is denied for the reasons set forth herein.

The cross motion by the plaintiff to amend his complaint, pursuant to CPLR §3025(b), is granted as proposed (see Exhibit A annexed to plaintiff's cross motion) for the reasons set forth herein.

Plaintiff commenced this action alleging the Bank did not reveal and/or disclose all the relevant information to plaintiff so that he could make an informed decision as to his monthly mortgage payments. Plaintiff sought a thirty (30) year mortgage loan to be secured by a mortgage on 58 Hawthorne Road, East Islip, New York. Plaintiff alleges the bank did not reveal that the Bank's receipt of a "yield spread premium" or service release premium paid to it by IndyMac Bank Corp., FSB ("IndyMac") would affect, i.e. raise, plaintiff's interest rate and the Bank did not obtain for plaintiff the best rate possible. The Bank, in its capacity as a mortgage broker, had obtained the mortgage funds for plaintiff from IndyMac. The Bank contends the plaintiff

expressly acknowledged, in writing, that he knew and agreed that the Bank was receiving a yield spread premium (“Y.S.P.”), which would be paid to the Bank by IndyMac, the Y.S.P. would be based upon the interest rate which the plaintiff received, and the Y.S.P. would be up to a maximum of two points or 2% of the principal loss amount. The Bank states the Y.S.P. was a cost of obtaining the loan in addition to the amount the plaintiff would actually receive from the loan and which the plaintiff would be obligated to repay with interest over the term of the loan (see Exhibits D-J annexed to Bank’s motion).

Plaintiff has sought to amend its complaint (as proposed; see Exhibit A annexed to his cross motion). The amended complaint alleges a violation of General Business Law § 349(a), breach of fiduciary duty, unjust enrichment, compensatory and punitive damages, plus costs and expenses. Plaintiff seeks to delete all references to a class action as well as delete the cause of action for criminal commercial bribery.

Leave to amend a pleading should be freely given pursuant to CPLR §3025 [b] in the absence of prejudice or surprise, *citing Leszczynski v Kelly & McGlynn*, 281 AD2d 519 (2d Dept 2001) and the decision to grant such leave is left to the sound discretion of the court, *citing Ford Motor Credit Co. v Dollinger*, 303 AD2d 451(2d Dept. 2003). There is no prejudice or surprise involved herein. Plaintiff seeks to have his complaint reflect the decertification of the class by the Appellate Division, Second Department and to make his compliant more viable.

There is no private right of action for the alleged violation by a mortgage lender under the survival statute prohibiting commercial bribery for the alleged paying of a bribe to a mortgage broker in the form of a yield spread premium, *citing Wint v ABN Amro Mortgage Group, Inc.*, 19 AD3d 588 2d Dept 2005). Clearly, this is not a viable cause of action. Plaintiff has deleted it

from his amended complaint.

The Appellate Division, Second Department, decertified plaintiff's action as a class action proceeding *citing Shovak v Long Island Commercial Bank*, 35 AD3d 837 (2d Dept 2006).

The Appellate Division, Second Department held the test as to whether a yield spread premium constitutes a reasonable compensation is an individual, fact intensive analysis, *see Shovak v Long Island Commercial Bank, supra*.

The issue here is whether a fiduciary relationship exists. Plaintiff alleges such a relationship exists since the Bank, in its capacity as mortgage broker, was obligated to find plaintiff the best mortgage rate. The Bank contends the situation herein was one where the Bank merely put plaintiff in touch with a mortgage lender wherein the mortgage lender, here IndyMac, would lend the plaintiff funds. The bank would be compensated, and plaintiff would repay the mortgage and any "fee," or "yield spread premium" paid to the Bank by IndyMac. The Bank alleges the plaintiff was totally aware of all the costs, fees, etc., to be paid to the Bank and the impact on plaintiff's monthly mortgage payments.

A cause of action to recover damages for breach of a fiduciary duty will be dismissed where the plaintiff failed to show that a fiduciary duty existed between her and the mortgage broker, *citing Lum v New Century Mortgage Corp.*, 19 AD3d 558 (2d Dept 2005). A standard non-discretionary account or contract will not support a cause of action for breach of a fiduciary duty, *citing Liberman v Worden*, 268 AD2d 337 (1st Dept 2000); *see also Northeast General Corp. v Wellington Advertising, Inc.*, 82 NY2d 158 (1993).

However, to the extent that one party functions as an expert advisor to its clients on market conditions, a fiduciary duty may exist, *citing EBC I, Inc. v Goldman, Sachs & Co.*, 5

NY3d 111 (2005).

In determining whether a fiduciary relationship exists, a court will look to whether a party reposed confidence in another and reasonably relied on the other's superior expertise or knowledge, *citing Chasenoff v Perlberg*, 19 AD3d 635 (2d Dept 2005); *Sergeants Benevolent Association Annuity Fund v Renck*, 19 AD3d 107 (1st Dept 2005).

Whether a mortgage broker may function as a fiduciary depends on the facts and circumstances. A broker introduces and brings parties together and the broker must bring the parties to an agreement. A broker thus has a "defined fiduciary duty" to act in the best and more involved interest of the principal *see Northeast General Corp. v Wellington Advertising, Inc., supra*.

At this point in the proceeding (with little discovery) the record is not complete enough for this court to make the determination as to whether a fiduciary relationship existed between plaintiff and the Bank.

The Bank alleges that the plaintiff is an expert in real estate so as not to rely on the Bank's alleged expertise. However, the Court is faced with allegations only by the Bank versus the plaintiff's allegations that he experienced a financial shock based on the ultimate mortgage payments.

Clearly, the record does not reflect what evidence could or would be adduced after discovery or at trial *see Yellot v Poritzky*, 170 AD2d 676 (2d Dept 1991). Now, plaintiff has presented viable allegations of a fiduciary relationship.

Plaintiff has alleged causes of action for the alleged violation of General Business Law § 349 by the Bank.

To assert a viable claim under General Business Law § 349(a), a plaintiff must plead that the challenged conduct was consumer oriented, the conduct or statement was materially misleading and damaging *citing Stutman v Chemical Bank*, 95 NY2d 24 (2000). There are no materially misleading statements if the record reveals the information was fully disclosed to the plaintiff, *see Lum v New Century Mortgage Corp.*, *supra*.

General Business Law § 349, part of the Consumer Protection Act, is intentionally broad applying to virtually all economic activity, *citing Goshen v Mutual Life Insurance Company of New York*, 98 NY2d 314 (2d Dept 1999).

Deceptive acts or practices in the conduct of any business conducted in New York are unlawful under the General Business Law (General Business Law § 349[a]; *see Negrin v Northwest Mortgage, Inc.*, 263 AD2d 39).

Here, there is a broad, general picture of the dangers of what a yield spread premium entails (i.e. possible higher monthly payments) with no clue as to how high. The ability of some institutions to add fees, etc., and present creative ways to maximize profits can, at times, cause the borrower to take on additional payments larger than expected or anticipated.

Also, for most people seeking to own a home, a mortgage loan is the only avenue to have ownership. With the well-documented collapse of the sub-prime market in the news, as noted by the headlines of late, the search for fair and forthright mortgages and accurate payment information is vital.

Where a plaintiff was at a mortgage broker's mercy, i.e., if a party wanted to sell her house or condo and move, she was required to pay a fee, then it can be a typical act of consumer fraud since the individual plaintiff is up against a commercial entity that enjoys a disparity of

bargaining power *Negrin v Northeast Mortgage, Inc., supra*.

As noted by the plaintiff, the Banking Board regulation (3 NYCRR 38.4) requires the disclosure of fees to be paid. Nowhere in the written agreement does it explain the basis for the amount of Y.S.P. to be paid to the Bank and how it would affect plaintiff's payments. While the agreement says the Bank may get a Y.S.P. of 2 points (percent), plaintiff raises the query—did the Bank, as his alleged fiduciary, get the most advantageous deal for plaintiff, i.e., the lowest mortgage rate? Was the yield spread premium fair and reasonable? Was the maximum amount—2 points (percent) fairly obtained and determined?

As for punitive damages, a public harm showing is not required for an award of punitive damages to tort cases for breach of a fiduciary duty, *citing Don Buckwald & Assoc., Inc. v Rich*, 281 AD2d 329 (1st Dept 2001). Based on plaintiff's allegations of a fiduciary relationship, plaintiff's allegations of punitive damages are viable.

On a motion to dismiss pursuant to CPLR §3211(a)(7), the material allegations contained in the complaint are deemed true as are all reasonable inferences implied from such allegations, *citing Rovello v Orogino Realty Co.*, 40 NY2d 633 (1976). If the factual allegations taken together give notice of what is intended to be proved and manifest a cause of action cognizable at law, the motion must be denied, *citing Guggenheimer v Ginzburg*, 43 NY2d 268 (1977). Clearly, the court is not required to evaluate the evidentiary merits of the complaint, *see Guggenheimer v Ginzburg, supra*. At this point, the plaintiff has met its burden in presenting a viable complaint.

In order for a party to prevail on a motion to dismiss based on documentary evidence pursuant to CPLR §3211(a)(c), the movant must show that the documentary evidence conclusively refutes the allegations in the opposing party's pleadings, *citing AG Capital Funding*

Partners, L.P. v State Street Bank Y Trust Co., 5 NY3d 582 (2005).

The Bank has not met this burden. Plaintiff's argument is that the Bank, as a fiduciary, had the burden to obtain for plaintiff the best possible mortgage rate, but the Bank did not do so. The documents provided by the Bank do not extinguish this allegation. The fact that plaintiff is given information that the "points" could be up to 2% does not tell plaintiff he obtained the best rate from the Bank's efforts.

The amended complaint, as proposed, will be deemed served upon the Bank upon service of a copy of this order.

The parties are reminded that they must appear for a Preliminary Conference in DCM on September 6, 2007 at 9:30 A.M.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: Mineola, New York
August 30, 2007

ENTER:


HON. MICHELE M. WOODARD, J.S.C.

ENTERED

SEP 04 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE