

**Beyer v Cullinan**

2007 NY Slip Op 32992(U)

September 4, 2007

Supreme Court, Suffolk County

Docket Number: 0025859/2001

Judge: Robert W. Doyle

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mortgage banker's license, allegedly assigned the mortgage to the plaintiffs in November 1993 for nominal consideration.

Plaintiffs commenced an action for foreclosure on October 15, 2001 wherein they allege that the Cullinans defaulted on the mortgage in June 1998. Plaintiffs then moved for summary judgment but by order dated November 29, 2005 (J. Oliver) the Court denied plaintiffs' motion on the grounds that plaintiffs failed to establish a proper assignment of the mortgage. The Court also denied the portion of the Cullinan's cross motion seeking dismissal of plaintiffs' complaint, but granted the portion of their motion seeking to amend their answer to include an affirmative defense and counterclaim based on usury.

Defendants Cullinans now move for summary judgment dismissing plaintiffs' complaint and discharging the mortgage on the grounds that the subject mortgage is usurious, and that plaintiffs' action is time barred having been commenced after the expiration of the applicable statute of limitations. In support of their motion defendants submitted, *inter alia*, copies of the pleadings; a copy of the Court's order denying plaintiffs' summary judgment motion; a copy of the title search for the subject property; a copy of the alleged assignment of the mortgage to the plaintiffs; a copy of the mortgage agreement and disclosure statement and a copy of an article published by Newsday which reported David Beyer's purported participation in a reverse redlining scheme which encouraged homeowners to finance home loans they could not afford. Defendants also submitted the deposition testimony of Greg Beyer.

In opposition, plaintiffs argue that defendants' motion should be dismissed because it violates the rule against successive summary judgment motions. Plaintiffs also contend that defendants tolled the statute of limitations for the foreclosure action by submitting mortgage payments in July and August 1999 and by acknowledging their mortgage obligation by requesting a mortgage payoff statement on December 9, 2003. Additionally, plaintiffs also assert that as assignees of the junior mortgage they are exempt from the usury proscriptions under Banking Law §590-(a) (1).

On a motion for summary judgment, the movant bears the initial burden of establishing his cause of action or defense sufficiently to warrant the court to direct judgment in his favor as a matter of law. Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues of fact remain which preclude summary judgment in the movant's favor (*Altieri v Golub Corporation*, 292 AD2d 734, 741 NYS2d 126 [2002]). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (*Zuckerman v New York*, 49 NYS2d 557, 427 NYS2d 595[1980]). In determining a motion for summary judgment, the court's function is not to resolve issues of fact or to determine matters of credibility but rather to determine whether issues of fact exist precluding summary judgment (*see, Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]).

Initially the Court notes that defendants did not violate the rule against successive summary judgment motions since the Court neither signaled its intention to treat defendants' prior motion as a motion for summary judgment, but it specifically noted that defendants' motion was denied because defendants' failed to specify the grounds for its requested relief (*see, Weinstein, Korn & Miller*, 1 New York Civil Practice; CPLR 3211.01, *Matthew Bender & Company, Inc.* [2006]; *see also Rovello v Orofina Realty Co.*, 40 NY2d 633, 389 NYS2d 314 [1976]). Further, notwithstanding defendants' assertion that plaintiffs' foreclosure action is barred by the statute of limitations, plaintiffs demonstrated an issue of fact as to whether

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defendants revived the mortgage debt via their December 9, 2003 letter to the plaintiffs wherein defendants' attorney stated that "*Before my client pursues legal remedies with respect to this matter, he has instructed me to see what dollar amount would be sufficient to satisfy the mortgage obligation and avoid litigation*" (see, *Hon Fui Hui v East Broadway Mall Inc.*, 4 NY3d 790, 795 NYS2d 157 [2005]; *Williams v Lopes*, 9 Misc3d 1116A, 808 NYS2d 921 [2005]). Plaintiffs also submitted evidence that defendants made a partial mortgage payment in August of 1999 well after the expiration of the statute of limitations on August 23, 1996. However, assuming arguendo that the debt was revived, the Court must nevertheless determine the applicability of defendants' usury defense since a finding that the note is usurious is grounds for dismissal of plaintiffs' foreclosure action and discharge of the mortgage (see, *Freitas v Geddes S & L Ass'n*, 63 NY2d 254, 481 NYS2d 665 [1984]).

A party asserting the defense of usury must establish all the elements of the defense by clear and convincing evidence. The elements of usury are (1) a contract founded on a loan of, or forbearance to collect, money and (2) an intent on the part of the lender to charge the borrower more than the legal rate of interest at the time the loan or forbearance agreement was made. Although clear and convincing evidence is required, the elements of usury may be established where they appear on the face of the mortgage note (*Freitas v Geddes S & L Ass'n*, *supra*). For example, where on the face of the note a defendant is charged points in addition to the maximum allowable interest rate<sup>1</sup>, such a loan will be considered usurious because points are among those charges includable as interest charges under the General Regulations of the Banking Board (see, *Freitas v Geddes S & L Ass'n*, *supra*; see also, 3 NYCRR §4.2; 1-6 Bergman on New York Mortgage Foreclosures § 6.02, [Matthew, Bender & Co. Inc., 2007]). Upon finding a loan usurious General Obligations Law 5-511(2) requires that the note shall be surrendered and declared void and cancelled (see, *Seidel v 18 East 17h Street Owner Inc.*, 79 NY2d 735, 586 NYS2d 240 [1992]). However, even where a note is facially usurious, if it is established that the foreclosing party is a junior mortgage lender, or the lender's lawful assignee, the party is entitled to assert the usury exemption set forth in Banking Law §590-(a)(1) (see, *Galatti v Alliance Funding Co.*, 228 AD2d 550, 644 NYS2d 330 [1996]). Section 590-(a)(2) nevertheless requires that all licensed lenders seeking to benefit from the usury exemptions associated with §590-(a)(1) comply with a number of rules relating to disclosure and the prohibition of acceleration clauses within the loan contract. Among other things §590-(a)(2) requires that junior mortgage loan agreements shall contain in bold face type in ten point size.

DEFAULT IN THE PAYMENT OF THIS LOAN AGREEMENT MAY RESULT IN THE LOSS OF THE PROPERTY SECURING THE LOAN. UNDER FEDERAL LAW, YOU MAY HAVE THE RIGHT TO CANCEL THIS AGREEMENT. IF YOU HAVE THIS RIGHT, THE CREDITOR IS REQUIRED TO PRODUCE YOU WITH A WRITTEN SEPARATE NOTICE SPECIFYING THE CIRCUMSTANCES AND TIMES UNDER WHICH YOU CAN EXERCISE THIS RIGHT.

In addition to demonstrating that the mortgage agreement did not contain the bold type ten point disclosure notice required by §590-(a)(2), defendants have met their prima facie burden of establishing usury by submitting the mortgage agreement which on its face charged the defendants the maximum

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<sup>1</sup> Pursuant to New York General Obligations Law §5-501 and New York Banking Law §14-a(1), the maximum rate of interest upon the loan of any money is 16% per annum (see, *C&M Air Sys. v Custom Land Dev. Group II*, 262 AD2d 440, 692 NYS2d 146 [1999]).

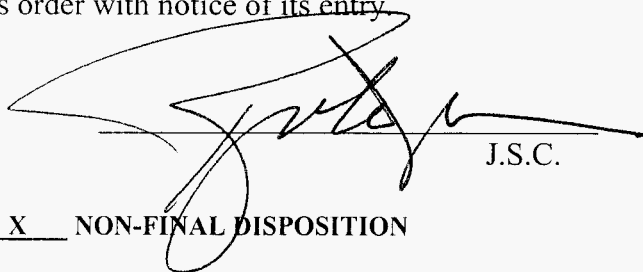
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allowable interest rate of 16% as well as six points or \$2,250.00 in loan origination fees (*see, Freitas v Geddes S & L Ass'n, supra*; *see also* 3 NYCRR §4.2; 1-6 Bergman on New York Mortgage Foreclosures § 6.02, [Matthew, Bender & Co. Inc., 2007]). Having thus established that the note was facially usurious, the burden then shifted to plaintiffs to show that they were eligible to assert the junior mortgage exemption of Banking Law §590-(a) by submitting evidence of a valid assignment of the mortgage (*see, Galatti v Alliance Funding Co., supra*). Although plaintiffs submitted a chain of title report which notes an assignment from Sterling Financial to their grandfather, Hy Beyer, and a document purporting to assign the mortgage from Hy Beyer to themselves, the deposition testimony of plaintiff Greg Beyer indicates that despite the alleged assignments, his father David Beyer continued to exercise control over the right to collect the mortgage debt as he had done while he was the president of Sterling Financial. Greg Beyer admitted that neither he nor his sister ever monitored the mortgage, or endorsed checks made payable to them for the purposes of servicing the debt. Indeed, Greg Beyer testified that it was his father David Beyer who kept all the records relating to the mortgage, informed him when the mortgage was in default and consulted attorneys for the purpose of prosecuting the foreclosure action against the Cullinans. Despite the alleged assignment to his father and children, the failure of David Beyer to relinquish control of the mortgage interest is evidence that the assignment was invalid and meant to avoid the consequences of then ongoing investigations which revealed that David Beyer through Sterling Financial was engaging in reverse redlining by knowingly soliciting high interest loans with balloon payments for low income home owners (*see, Coastal Commercial Corp., v Samuel Kosoff & Sons Inc.*, 10 AD2d 372, 199 NYS2d 852 [1960]; *TPZ Corp v Dabbs*, 25 AD3d 787, 808 NYS2d 746 [2006]; *In re Estate of Jordan*, 199 AD2d 998, 605 NYS2d 596 [1993]). Thus, not only will plaintiffs be unable to assert the usury exemption set forth in Banking Law 590-a(1), but in the absence of a valid assignment plaintiffs have no standing to bring the foreclosure action (*see, 1-6 Bergman on New York Mortgage Foreclosures 6.05*, [Matthew, Bender & Co. Inc., 2007]; *see also Terwin Advisors, LLS v ASHA Balbuchan*, 15 Misc3d 1127A, 2007 NY Misc Lexis 2968; *Mele v Travers*, 293 AD2d 950, 741 NYS2d 319 [2002]; *Votta v Votta Enters.*, 249 AD2d 536, 672 NYS2d 118 [1998]; *Terwin Advisors, LLS v ASHA Balbuchan*, 15 Misc3d 1127A, 2007 NY Misc Lexis 2968). Plaintiffs will therefore similarly be unable to assert any cross claims against the captioned co-defendants and their complaint seeking foreclosure should be dismissed.

Notwithstanding the invalidity of the assignment to the plaintiffs, such a failure is not grounds for discharge of the mortgage altogether since an assignor may still maintain an action in his own name where the purported assignment is invalid or incomplete.

Accordingly, defendant's motion for summary judgment dismissing the complaint is granted and plaintiffs' notice of pendency is hereby cancelled. The Clerk of the County of Suffolk is directed to cancel the notice of pendency upon service of a copy of this order with notice of its entry.

Dated: SEP 04 2007

  
 J.S.C.

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION