

WM Specialty Mtge., LLC v Miner

2007 NY Slip Op 33219(U)

October 3, 2007

Supreme Court, Nassau County

Docket Number: 9718-07/

Judge: Daniel R. Palmieri

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Sum

SHORT FORM ORDER

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

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----x
WM SPECIALTY MORTGAGE, LLC.,

TRIAL TERM PART: 50

Plaintiff,

INDEX NO.:8718/07

-against-

MOTION DATE:8-28-07

SUBMIT DATE: 9-25-07

SEQ. NUMBER - 001

**DANIEL W. MINER, MILDRED JOSEPH and
JOHN DOE #1 THROUGH JOHN DOE #10,
the last ten names being fictitious and unknown
to the plaintiff, the person or parties, if any, having
or claiming an interest in or lien upon the mortgaged
premises described in the Complaint,**

Defendants

-----x

The following papers have been read on this motion:

- Notice of Motion, dated 7-30-071**
- Affidavit in Opposition, dated 9-7-07.....2**
- Reply Affirmation, dated 9-14-07.....3**

Plaintiff's motion for summary judgment pursuant to CPLR §3212 is granted. Submit Order of Reference in accordance with this Decision.

This is an action to foreclose a mortgage on premises known as 53 Montauk Avenue, Merrick, New York, made by defendant Miner to plaintiff's assignee in the original principal amount of \$378,000. Defendant Miner, the owner and defendant Joseph (described in the

complaint as the holder of a subordinate mortgage), have interposed answers to the complaint. Defendant Joseph has not opposed this motion.

Defendant Miner opposes this motion by alleging that the loan was predatory, that he was over charged various fees and expenses of the transaction, that the itemization of the amount financed is in error because the Closing Agents Fee was actually less than as shown on the statement (\$2,000 vs. \$950. actual), thus overstating the prepaid finance charge. Defendant does not dispute his failure to comply with the terms of the mortgage, including nonpayment as alleged in the complaint and the moving papers.

“Entitlement to a judgment of foreclosure may be established as a matter of law where a mortgagee produces both the mortgage and unpaid note, together with evidence of the mortgagor’s default, thereby shifting the burden to the mortgagor to demonstrate through both competent and admissible evidence, any defense which could raise a question of fact.” *HSBC Bank USA v. Merrill*, 37 AD3d 899, 900 (3rd Dept. 2007). Here, plaintiff has made a *prima facie* showing of entitlement to summary judgment by producing the mortgage and unpaid note, thus shifting the burden to defendant to demonstrate the existence of triable issues of fact. *Gates v. Easy Living Homes, Inc.*, 29 AD3d 733 (2d Dept. 2006).

Defendant in effect asserts as a defense that plaintiff violated the Federal Truth in Lending Act, 15 U.S.C. §1601 *et seq* (hereinafter TILA).

Defendant’s claims of overcharging as to various fees are unsupported by any competent evidence of what the fees should be, the amount of the discrepancies are

de minimus and in any event, the disparities are not so inextricably intertwined with plaintiff's cause of action for foreclosure so as to constitute a defense to plaintiff's motion for summary judgment. *LaSalle Bank Nat. Ass'n v. Kosarovich*, 31 AD 3d 904, 906 (3rd Dept. 2006).

Defendant's conclusory statements that the loan was predatory are belied by the documents which clearly express the amount to be borrowed, the interest rate, fees and closing costs and the use of the proceeds, the vast majority of which were devoted to the pay off defendant's existing mortgage (\$303,800) and to retention by defendant (\$55,834.16). Defendant claims that the Itemization of Amount Financed Form is incorrect because it specifies a \$2,000 Closing Agent Fee that was in fact \$950, however, that entry applies to all of the items shown in the 1100's section of the Settlement Statement, the total of which actually exceed the \$2,000 item on the Amount Financed Form. In any event, defendant has failed to demonstrate that there was any miscalculation of the amount of principal, interest and fees charged to him.

The purpose of TILA is to ensure a meaningful disclosure of the cost of credit and the TILA disclosure statement should be read in the context of the other documents. As long as there is clear disclosure of the required information, minor violations which do not cause any potential or actual harm will not be found to violate TILA. *JP Morgan Chase v. Tecl*, 24 AD3d 1001 (3rd Dept. 2005); *EquiCredit Corp., v. Turcios*, 300 AD2d 344 (2d Dept. 2002); *cf Bankers Trust Co. of California, N.A. v. Ward*, 269 AD2d 480 (2d Dept. 2000).

This was a relatively uncomplicated transaction in which defendant contacted a mortgage broker, with whom he had previously done business, to refinance an existing loan

because he had an immediate need for extra funds. The documents submitted clearly set forth the fees, expenses and uses of the proceeds. There was only one existing loan to be prepaid and the balance of the loan proceeds were used to pay expenses or pocketed by defendant. There is nothing about the transaction that is unconscionable (*Rodriguez v. Rodriguez*, 11 AD3d 768 (3rd Dept. 2004)). Although in retrospect defendant may not have made a good bargain there is no evidence to support a conclusion that he was not adequately informed of its terms and his obligations and thus his admitted default may not be excused. *LaSalle Bank Nat. Ass'n v. Kosarovich*, *supra* 906.

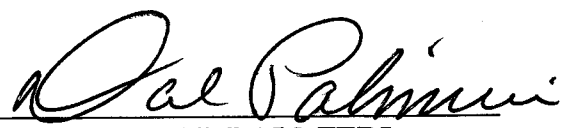
The foregoing determination grants the plaintiff the right to an Order of Reference pursuant to which a referee will be appointed to compute the amount due to the lender. Defendant may, if he be so disposed, present evidence to the referee to support his claims of overcharges of expenses or any perceived miscalculation of interest or principal due to plaintiff by way of set off or recoupment which might offset any damage award or deficiency judgment. *Delta Funding Corporation v. Murdaugh*, 6 AD3d 571 (2d Dept. 2004). The referee is authorized and directed to give notice of the referee's hearing to compute which shall be held on the record, at plaintiff's expense in the Court House, 100 Supreme Court Drive, Mineola, New York, 11501, on such date as the referee shall determine.

Defendant's claims of an improper relationship among the various participants in his transaction are unsupported by any competent evidence. Defendant's claim that he was told by the lender's attorney that he did not need his own attorney is insufficient to establish a defense of fraud.

This shall constitute the Decision and Order of this Court

ENTER

DATED: October 3, 2007



HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED

TO: Linda P. Manfredi, Esq.
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OCT 09 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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