

Business Loan Ctr. v David Cronheim Mtge. Corp.

2007 NY Slip Op 34088(U)

December 6, 2007

Supreme Court, New York County

Docket Number: 0600099/2006

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Charles Edward Ramos

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PRESENT: _____

PART _____

Justice

Index Number : 600099/2006

BUSINESS LOAN CENTER, LLC

vs

DAVID CRONHEIM MORTGAGE CORP.

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this 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

FILED
DEC 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

Is decided in accordance with
accompanying memorandum decision and order.

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

Dated: 12/6/07


HON. CHARLES E. RAMOS

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:COMMERCIAL DIVISION
-----X
BUSINESS LOAN CENTER,

Plaintiff,

Index No. 600099/06

-against-

DAVID CRONHEIM MORTGAGE CORP.,
BAYVIEW FINANCIAL TRADING GROUP,
and INTERBAY FUNDING, LLC,

Defendants.

FILED

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NEW YORK COUNTY CLERK'S OFFICE

-----X
Charles Edward Ramos, J.S.C. Group ("Bayview") and

Defendants Bayview Financial Trading Group ("Bayview") and
Interbay Funding, LLC ("Interbay") move for summary judgment
pursuant to CPLR 3212. Plaintiff Business Loan Center, LLC
("BLC") cross-moves against Bayview and Interbay for summary
judgment on two of its four causes of action.

BLC is a provider of small business loans guaranteed, in
part, by the United States Small Business Administration ("SBA").
David Cronheim Mortgage Corp. ("Cronheim") is a mortgage lender,
as well as a developer and investor in real estate. Bayview and
Interbay both make and purchase mortgage loans throughout the
United States. Interbay does not set forth any independent
grounds for its motion and will therefore be treated in the same
manner as Bayview.

Two simultaneous loans were made to Adbul R. Rajabali, one
by BLC was a small business loan for \$1,143,000 (the "BLC loan").
The BLC loan was secured by a second lien position on two parcels
of Texas commercial real estate. Rajabali obtained the second
loan from Cronheim in the amount of \$1,392,000 (the "Cronheim

Loan"), which was secured by a first lien position on the same Texas commercial property. The Cronheim loan was "table funded" by Bayview. Cronheim merely brought the loan to Bayview and did all of the underwriting but Bayview funded the loan. For all purposes this Court must treat Cronheim and Bayview as one entity.

The dual creditor relationship between BLC and Cronheim/Bayview and the first position priority of the Cronheim loan and second lien priority of the BLC loan were all outlined in an Intercreditor Agreement (the "ICA").

Rajabali discontinued payments on the both the BLC and Cronheim loans, and both loans went into default. Interbay, as a servicer of the Cronheim loan, took steps to enforce the Cronheim loan. On October 19, 2001, Interbay notified Rajabali that it had accelerated the indebtedness due under the Cronheim Loans and issued a Notice of Default to Rajabali on September 21, 2001, all without notice to BLC. On September 26, 2001, BLC issued its own Notice of Default to Rajabali. Notwithstanding the requirement that Bayview not default the borrower until the BLC loan was in default, Bayview failed to determine whether the BLC loan was in default prior to issuing its own notice of default.

The most serious issue to this Court is that Bayview never notified BLC that it had accelerated the Cronheim loan or that it or its successor proceeded with the foreclosure process. The fact that the ICA states that Cronheim waives the right to accelerate the loan unless the BLC loan is in default is not

dispositive. The fact that the BLC loan was in default as of the date Bayview acted renders Bayview's failure to inquire irrelevant.

On December 3, 2001, Bayview sold the Cronheim loan to Cash Technologies of America ("CTA"). On December 4, 2001, CTA then foreclosed upon the Cronheim loan. BLC took no action regarding the default against Rajabali, but sued CTA. BLC accepted a \$175,000 settlement from CTA in connection with the BLC loans in that action.

BLC brought this suit against Cronheim, Bayview, and Interbay for breach of the ICA, breach of the covenant of good faith and fair dealing, unjust enrichment, and rescission of the ICA.

In order to grant summary judgment, the court must determine whether a material and triable issue of fact exists. See *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957). After the movant makes a prima facie case, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a material issue of fact that requires a trial. *Winegrad v New York Medical Univ. Med. Cen.*, 64 NY2d 851 (1985). When deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the party opposing the motion and must give that party the benefit of every inference which can be drawn from the evidence. See *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989).

Breach of Contract

Plaintiff's cross-motion for summary judgment as to breach of the ICA is granted in part because Bayview failed to use any effort to notify BLC as to the acceleration and foreclosure of the Cronheim loan or the sale of Cronheim Loan to CTA.

The ICA states:

...Each lender shall also use its best efforts to notify the other lender of any change in the location of any of the Collateral or the business operations of the Borrower or of any change in law which would make it necessary or advisable for the other lender to file additional financing statements in another location as against the Borrower, but the failure to do so shall not create a cause of action against the party failing to give such notice or create any claim or right on behalf of any third party. ¶11. (Emphasis added).

Bayview, after accelerating, noticing a default and selling the Cronheim loans to CTA, was required to use its "best efforts" to notify BLC of these activities and change of circumstances. The rationale underlying the ICA is to protect the signatories from avoidable collateral damage in the event the borrower defaults. Bayview's contention that it would incur no liability from a failure is a complete misreading of the ICA. The intent of the liability exclusion related only to liability to a third party. There is no bar to BLC, a party to the ICA, from bringing suit.

Since it is undisputed that Bayview made no effort to notify BLC, it is in breach of the ICA.

Further, when Bayview sold the Cronheim Loan to CTA, the

Loan Sale Agreement makes clear that the loan was paid in full.¹ According to the ICA, Bayview was obligated to "transfer" to BLC "any Collateral or proceeds therefrom held by it which are in excess of the loan being paid the other Lender..." ¶9.

The fact that Bayview may have been "overpaid" in any respect to the sale of the Cronheim Loans to CTA, does not defeat BLC's priority with regard to the default interest rate, a late payment charge, or a prepayment penalty (collectively, the "Subordinate Sum") or require Bayview to remit the excess to BLC.

The ICA requires that Bayview:

"waive[s] any provisions in the Cronheim Agreements providing for a default interest rate, a late payment charge, or a prepayment penalty that is not subordinate to the [BLC] Loan." ¶6. (Emphasis added).

BLC argues that the Subordinate Sum of \$324,719.78 is owed to BLC because Bayview waived any right to these monies. However, ICA does not affect the sale of this loan. BLC correctly argues that these monies "are expressly subordinated to the payment of the BLC Loan." BLC Reply Memo at 2. Under the ICA, the Subordinate Sum is clearly not waived. Bayview has potential liability for a portion of the Subordinate Sum, if plaintiff is otherwise unable to recover that amount. However, the mere fact of a sale did not defeat BLC's priority to that sum. It is still potentially recoverable.

BLC also argues that its loan was not actually in default because the meaning of the word "default" in the letter is

¹The Loan Sale Agreement expressly defines the "purchase price" as the "total debt due" under the note being sold. ¶3.3.

[*7]
dissimilar to the meaning defined in the BLC Loan. This Court is not persuaded. Further, as aforesaid, Bayview's acceleration of the Cronheim Loan without actual knowledge of the BLC Loan default is not an express breach of the ICA.

Having been found to have breached the ICA in part, defendants' motion for summary judgment dismissing the breach of contract claim must be denied as academic.

Rescission

In support of BLC's argument for rescission, it cites to *Callanan v Keeseville, Ausable Chasm & Lake Champlain R.R. Co.*, 199 NY 268 (1910) which holds that a contract may be rescinded where the breach goes "to the root of the contract, unless the damages can be ascertained with reasonable certainty..." However, BLC fails to support why damages cannot be ascertained with reasonable certainty. BLC precisely states its claimed damages as "the sums it loaned to the Borrower, net of the proceeds of the Texas settlement - \$1,029,321.20." BLC Memo at 16. Thus, for BLC, summary judgment as to rescission is denied. Likewise, BLC's request to amend the complaint pursuant to CPLR 3025(c) in connection with the claim for rescission is futile and thus denied.

The defendants' motion to the extent it moves to dismiss the fourth cause of action seeking rescission is granted. "The equitable remedy of rescission is to be invoked only when there is lacking complete and adequate remedy at law and where the status quo may be substantially restored." *Sokolow v Lacher*, 299

AD2d 64, 71 (1st Dept 2002). Here, the plaintiff has an adequate remedy at law; damages for breach of the ICA. Moreover, plaintiff's settlement with CTA hinders any attempt to restore the status quo. Therefore, the claim for rescission of the ICA is dismissed.

Implied Covenant of Good Faith and Fair Dealing

Defendants' motion for summary judgment dismissing the claim for breach of implied covenant of good faith and fair dealing is granted. Here, whether a reasonable person could conclude that the ICA impliedly obligated Bayview to ascertain whether the BLC loan was in default before it accelerated the indebtedness due under the Cronheim Loans, or any other breach of the implied covenant, is irrelevant, as is stated above.

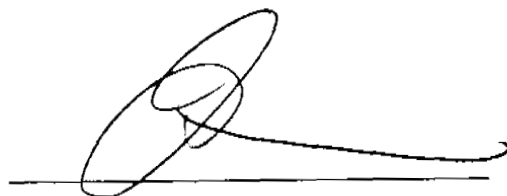
Unjust Enrichment

Lastly, plaintiff fails to state a cause of action for unjust enrichment as the existence of a valid contract governing the subject matter generally precludes recovery in quasi-contract for events arising out of the same subject matter. *EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11 (2005). The ICA is a valid agreement. Bayview is bound by its terms. Therefore, plaintiff's claim for unjust enrichment is dismissed. Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing the complaint is granted as to plaintiff's claims for implied covenant of good faith, rescission and unjust enrichment, and otherwise denied; it is further

ORDERED that plaintiff's cross-motion for summary judgment on the issue of liability is granted as to the breach of contract claim, and otherwise denied, including a denial of summary judgment on the Subordinate Sum claim.

Dated: December 6, 2007



J.S.C.

HON. CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

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