

Eastern Sav. Bank, FSB v Bottone

2008 NY Slip Op 30456(U)

February 13, 2008

Supreme Court, Suffolk County

Docket Number: 0021971/2006

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

P R E S E N T :

Hon PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 12-27-06
ADJ. DATE 5-2-07
MNEMONIC: 001 - MG

-----X
EASTERN SAVINGS BANK, FSB, :
 :
 : Plaintiff, :
 :
 : - against - :
 :
 : MARK BOTTONONE and "JOHN DOE # 1 :
 : through JOHN DOE # 12, the last twelve :
 : names being fictitious and unknown to :
 : plaintiff, the persons or parties intended being :
 : the tenants, occupants, persons or :
 : corporations, if any, having or claiming an :
 : interest upon the premises described in the :
 : complaint. :
 : Defendants. :
-----X

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Upon the following papers numbered 1 to 35 read on this motion for summary judgment, an order of reference and other relief; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers 12 - 24; Replying Affidavits and supporting papers 25 - 33; Other 34 - 35 (sur-reply); (~~and after hearing counsel in support and opposed to the motion~~) it is.

ORDERED that this motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in its favor on its complaint; pursuant to CPLR 3211(b) striking the answer and affirmative defenses of the the defendant Mark Bottone; pursuant to RPAPL §1611 for an order of reference appointing a referee to compute the sums due and owing to the plaintiff; and amending the caption of this action to replace the defendant "John Doe #1" with Costal Designs (hereinafter CD) and deleting the names of "John Doe #2" through "John Doe #12" is granted; and it is further

ORDERED that V. Anthony Maggipinto, Esq., with an office at 1212 Roanoke Avenue, Riverhead, New York 11901-0902 is hereby appointed Referee to ascertain and compute the amount due upon the note and mortgage documents on which this action was brought to foreclose, and to examine and report whether the mortgaged premises can be sold in one parcel; and it is further

ORDERED that pursuant to CPLR 8003 (a) the Referee be paid the statutory fee for the computation of the amount due the plaintiff; and it is further

ORDERED that the pleadings and papers served and filed in this action be amended by substituting CD in place of "John Doe #1" and by deleting the names of "John Doe #2" through "John Doe #12."

This is an action to foreclose a mortgage on premises known as 63 Round Swamp Road, Huntington, New York (hereinafter Huntington). On February 9, 2006, the defendant Mark Bottone (hereinafter Bottone) executed a mortgage on said premises in favor of the plaintiff Eastern Savings Bank, FSB to secure a note in the principal sum of \$820,000.00. The plaintiff's counsel sent the defendant Bottone a notice of default, dated May 8, 2006, stating that the defendant Bottone had defaulted on his monthly loan payments beginning with the first installment due on April 1, 2006.

The plaintiff subsequently commenced this foreclosure action. In its complaint, the plaintiff alleged that Bottone had failed to pay the monthly payments due from April 2006 to August 2006 and that the total amount of each monthly payment was \$9,807.69.

By his answer, Bottone asserted a first affirmative defense that the sums sought by the plaintiff had been paid in whole or in part; a second affirmative defense that the plaintiff was unable to establish a prima facie case; a third affirmative defense that the plaintiff's complaint failed to state a cause of action; a fourth affirmative defense that the documents allegedly executed by Bottone were signed by coercion and under duress; a fifth affirmative defense that the loan amount and interest rate charged by the plaintiff are inconsistent with the good faith estimate provided by the plaintiff and signed by Bottone; and a sixth affirmative defense that notice of the alleged default by the plaintiff had not been properly served pursuant to the terms of the loan documents.

The plaintiff now moves for summary judgment on its complaint contending that Bottone failed to comply with the terms of the loan agreement and mortgage and that his affirmative defenses lack merit. In support of its motion, the plaintiff submits the affidavit, dated December 7, 2006, of Jerry Bowling, the plaintiff's vice president (hereinafter Bowling); the note and addendum to the note, dated February 9, 2006, executed by Bottone; the mortgage, dated February 9, 2006, executed by Bottone; the notice of default, dated May 8, 2006, and certified mail receipt; the summons and complaint with attached note and mortgage; affidavits of service of the summons, complaint and notice of pendency upon Bottone at CD at 63 Round Swamp Road in Huntington, New York pursuant to CPLR 308 (2) by delivery to a "suitable age person," Allison Seeley, the office manager, and upon CD a/k/a "John Doe #1" by delivery to the office manager; and the answer of the defendant Bottone.

"[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default" (**Republic Natl. Bank of N.Y. v O'Kane**, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; see, **Village Bank v Wild Oaks Holding**, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]). Once the plaintiff has made this showing, the burden then shifts to the defendant to produce evidentiary proof in

proof in admissible form sufficient to require a trial. (see, **Aames Funding Corp. v Houston**, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; **Household Finance Realty Corp. of New York v Winn**, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]).

Here, the plaintiff produced the note, addendum to the note and the mortgage executed by the defendant Bottone as well as evidence of Bottone's nonpayment, thereby establishing a prima facie case as a matter of law (see, **Aames Funding Corp. v Houston**, *supra*; **Wells Fargo Bank Minnesota, Nat. Assn. v Mastropaolo**, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). Bowling, the plaintiff's vice-president, stated, in his affidavit, that Bottone borrowed funds totaling \$820,000.00 with a rate of interest of 12.49 percent and that Bottone defaulted on his payment due on April 1, 2006 and had not cured the default since said date. New York law is clear that when a mortgagor defaults on loan payments, even if only for a day, a mortgagee may accelerate the loan, require that the balance be tendered or commence foreclosure proceedings, and equity will not intervene (see, **First Federal Sav. Bank v Midura**, 264 AD2d 407, 694 NYS2d 121, 122 [2d Dept 1999] quoting **New York Guardian Mortgagee Corp. v Olexa**, 176 AD2d 399, 401, 574 NYS2d 107 [3d Dept 1991]). Once a mortgagor defaults on loan payments, a mortgagee is not required to accept less than the full repayment as demanded (see, **First Federal Sav. Bank v Midura**, 264 AD2d at 408). Bowling also stated, in his affidavit, that Bottone was notified by a letter, dated May 8, 2006, of his payment default and that the entire amount owed under the note would be accelerated if payment was not made in thirty days. Bowling further stated, in his affidavit, that Bottone failed to cure his default and thus, the plaintiff accelerated the note. The plaintiff's submission of the note, addendum to the note and mortgage and the affidavit of Bowling, established its prima facie entitlement to summary judgment (see, **Charter One Bank, FSB v Leone**, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]).

Once the plaintiff has made a prima facie showing, it is incumbent on the defendant "to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the the plaintiff" (see, **Cochran Inv. Co., Inc. v Jackson**, 38 AD3d 704, 834 NYS2d 198, 199 [2d Dept 2007] quoting **Mahopac Natl. Bank v Baisley**, 244 AD2d 466, 467, 664 NYS2d 345 [2d Dept 1997]).

In opposition to the motion, the defendant Bottone contends that the plaintiff made significant modifications to the loan documents a few hours prior to closing by reducing the loan amount from \$1,000,000.00 to \$820,000.00, raising the interest rate from 10.99 percent to 12.49 percent, and imposing a pre-payment penalty for a three year period, thereby leaving Bottone with no viable opportunity to obtain alternative financing. In addition, Bottone contends that the plaintiff based said modifications on the purported recent discovery of Bottone's poor credit history. Bottone further contends that the plaintiff made these last minute changes with the knowledge that Bottone was under severe financial duress in that he needed these funds from the refinance of his residence to prevent his forfeiture of a contract deposit of \$83,000.00 to purchase real property on Dune Road in Westhampton, New York (hereinafter Dune Road) that he had contracted to purchase.

In support of his opposition, Bottone submits, among other things, his affidavit; his attorney's affidavit; his answer; the contract of sale, dated December 1, 2005, of the Dune Road property; time of the essence notices, dated January 9, 2006 and January 30, 2006, from the attorneys representing the sellers of the Dune Road property to Bottone's attorney; the good faith estimate prepared on February 2, 2006; broker closing sheets from February 8 and 9, 2006; the cancellation notice, dated February 14, 2006, signed by Bottone; and correspondence, dated February 14, 2006, from the plaintiff reducing the prepayment premium from three years to one year and from Bottone's attorney rescinding his client's cancellation, based on said reduction.

In his affidavit, Bottone explains that the Huntington premises is his residence, which had an appraisal value of \$2,000,000.00 in December 2005. According to him, that same month he entered into a contract of sale to purchase real property located on Dune Road for the sum of \$1,674,500.00. Bottone states that a contract deposit of \$83,000.00 was paid to the seller's attorney and placed in escrow pending title transfer. Bottone further explains that in order to consummate the Dune Road property purchase, he sought loan financing through non-party Mortgage Advantage, a mortgage broker, with the intention of refinancing his Huntington property, which was encumbered by an existing mortgage of approximately \$270,000.00. According to Bottone, his attorney received correspondence from the sellers' attorney on or about January 9, 2006 indicating that closing was scheduled for January 17, 2006, time being of the essence, and the closing was thereafter adjourned to February 9, 2006. He states that he received a good faith estimate, with a loan rate of 10.99 percent, from the plaintiff on February 2, 2006 and he approved it on February 7, 2006 and a mortgage loan closing was scheduled for February 9, 2006. According to Bottone, hours prior to said closing the plaintiff advised his attorney that the loan's interest rate was being increased due to his poor credit history and updated closing figures were faxed to his attorney.

Bottone further states, in his affidavit, that on the date and at the time of the closing of the loan, February 9, 2006, he had no choice but to sign the loan documents as presented with a decreased principal, increased interest rate, and three year prepayment penalty term to prevent forfeiture of his \$83,000.00 deposit on the Dune Road property. However, he also stated that five days later, on February 14, 2006, he spoke with his attorney and decided to cancel the loan because the terms were wholly inconsistent with those originally presented by the plaintiff and sent the plaintiff the notice of cancellation on said date. Then, Bottone states that after certain communications, the plaintiff agreed to reduce the prepayment penalty term but continued to refuse to amend the interest rate or waive the severe financial penalties for prepayment and he, in turn, agreed to rescind cancellation of the loan. According to Bottone, he was unable to procure another loan in such short notice and sought to avoid forfeiture of the contract deposit of \$83,000.00 so the rescission of cancellation of the loan was made under extreme financial duress. Bottone states that he obtained the loan funds and that the Dune Road closing occurred on February 17, 2006.

Here, Bottone failed to submit any evidence raising a triable issue of fact rebutting the plaintiff's prima facie showing or any evidence establishing the merits of any of his affirmative defenses (see, **Wells Fargo Bank Minnesota v Perez**, 41 AD3d 590, 837 NYS2d 877 [2d Dept

2007]). Bottone's first affirmative defense that the sums sought by the plaintiff have been paid in whole or in part is unsupported by any documentation (see, **National Sav. Bank of Albany v Hartmann**, 179 AD2d 76, 582 NYS2d 523 [3d Dept 1992], *lv denied* 79 NY2d 759, 584 NYS2d 447 [1992]). Thus, he has no defense of tender of payment (see, **First Federal Sav. Bank v. Midura**, 264 AD2d at 408). In addition, his second affirmative defense that the plaintiff is unable to establish a prima facie case and third affirmative defense of failure to state a cause of action are boilerplate in nature and plainly lacking in merit (see, **La Salle Bank Natl. Assn. v Kosarovich**, 31 AD3d 904, 820 NYS2d 144 [3d Dept 2006]).

Bottone's fourth affirmative defense that the loan documents he signed were signed by coercion and under duress is also without merit (see, **Bankers Trust Co. of California, N.A. v Sciarpelletti**, 28 AD3d 408, 816 NYS2d 71 [2d Dept 2006], *lv dismissed* 7 NY3d 864, 824 NYS2d 608 [2006]). Significantly, nowhere in the contract of sale of the Dune Road property is it provided that its performance is contingent upon Bottone's ability to obtain financing (see, **Sohayegh v Oberlander**, 155 AD2d 436, 547 NYS2d 98 [2d Dept 1989]; **Zev v Merman**, 134 AD2d 555, 521 NYS2d 455 [2d Dept 1987], *affd* 73 NY2d 781, 536 NYS2d 739 [1988]). The resulting financial duress brought on by failing to include such a contingency in the contract of sale was of Bottone's own making. The unfortunate fact that Bottone may have struck a bad bargain does not excuse his default herein. (see, **La Salle Bank Natl. Assn. v Kosarovich**, *supra*).

Bottone's fifth affirmative defense that the loan amount and interest rate charged by the plaintiff are inconsistent with the good faith estimate provided by the plaintiff and signed by Bottone also lacks merit inasmuch as the good faith estimate is meant to be an estimate of charges for specific settlement services that the borrower is likely to incur, not the loan amount and interest rate (see, 24 CFR 3500.7). In any event, the plaintiff demonstrated by its reply submissions, including the affidavit of the plaintiff's loan analyst Jeanette Haynes, that after the initial good faith estimate, dated February 2, 2006, the plaintiff obtained negative information concerning Bottone's credit and mortgage payment history and a lower appraisal value of the Huntington property warranting repricing of the loan. Jeanette Haynes points out that a revised good faith estimate, dated February 6, 2006, submitted with the reply papers, was sent to Bottone three days prior to the closing. In his sur-reply, the attorney for Bottone does not acknowledge the existence of Bottone's poor credit and mortgage payment history or that the plaintiff did provide a revised good faith estimate three days prior to the closing but instead merely states that the reply submissions raise triable issues of fact. A bare assertion that issues of fact exist is insufficient to defeat a motion for summary judgment (see, **Alvarez v Prospect Hosp.**, 68 NY2d 320, 508 NYS2d 923 [1986]).

Bottone also failed to demonstrate his sixth affirmative defense that notice of the alleged default by the plaintiff was not properly served pursuant to the terms of the loan documents (see, **J & A Vending, Inc. v J.A.M. Vending, Inc.**, 303 AD2d 370, 757 NYS2d 52 [2d Dept 2003]).

Therefore, the answer of Bottone is stricken and the plaintiff is granted summary judgment as against the defendant Bottone. In addition, the plaintiff's request for an order of reference appointing a referee to compute the amount due the plaintiff under the note and

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mortgage is granted (see generally, **Vermont Fed. Bank v Chase**, 226 AD2d 1034, 641 NYS2d 440 [3rd Dept. 1996]; **Bank of East Asia, Ltd. v Smith**, 201 AD2d 522, 607 NYS2d 431 [2d Dept. 1994]).

Finally, the Court grants the plaintiff's request that the pleadings and papers served and filed in this action be amended by substituting Costal Designs in place of "John Doe #1" and by deleting the names of "John Doe #2" through "John Doe #12."

The plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court.

Dated: FEB 13 2008



J.S.C.