

**235 E. 4th St., LLC v Dime Sav. Bank of
Williamsburgh**

2008 NY Slip Op 32027(U)

July 18, 2008

Supreme Court, New York County

Docket Number: 0100575/2008

Judge: Carol R. Edmead

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

CAROL EDMOND
J.S.C.

PRESENT: _____

PART 35

Index Number : 100575/2008
235 EAST 4TH STREET LLC.

vs
DIME SAVINGS BANK OF
Sequence Number : 001
DISMISS COMPLAINT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

The instant motion is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion of defendant Dime Savings Bank of Williamsburgh for an order pursuant to CPLR 3211(a)(1) and (7), dismissing the Complaint of plaintiff 235 East 4th Street LLC, is **granted to the extent that** the following causes of action are dismissed:

- Plaintiff's second cause of action for unjust enrichment;
 - Plaintiff's fourth cause of action for restitution;
- and it is further

ORDERED that counsel shall appear before this Court for a preliminary conference on Tuesday, September 16, 2008, Part 35, 60 Centre Street, Room 438, New York, New York; and it is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

Dated: 7/18/08

[Signature]
CAROL EDMOND
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check If appropriate: DO NOT POST REFERENCE

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

FILED
JUL 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

235 EAST 4th STREET, LLC,

Plaintiff,

-against-

DIME SAVINGS BANK OF WILLIAMSBURGH,

Defendant.

EDMEAD, J.S.C.

Index No. 100575/08

DECISION/ORDER

FILED
JUL 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

Defendant Dime Savings Bank of Williamsburgh (“defendant” and/or “Dime”) moves for an order pursuant to CPLR 3211(a)(1) and (7), dismissing the Complaint of plaintiff 235 East 4th Street, LLC (“plaintiff”).

In this action, plaintiff seeks damages for an alleged breach of the consolidation, modification and extension agreement (“CMEA”) it made with defendant on December 18, 2003. The CMEA sets forth the terms and conditions of a loan secured by plaintiff’s premises known as 235/237 East 4th Street a/k/a 56/58 Avenue B, New York, New York.

Defendant’s Contentions

Under the CMEA, plaintiff agreed that it would not pay off the loan balance for two years and that it would pay a prepayment charge if it prepaid the loan in subsequent years. Absent a provision permitting it, a borrower has no right to prepay a loan. Therefore, where an agreement contains a prepayment provision it will be enforced according to its terms. In the case at bar, the CMEA contained a ninety day notice provision. Thus, defendant had the absolute right to insist on ninety days written notice before permitting plaintiff to prepay the loan. Plaintiff purportedly

[*3]

gave notice of prepayment two weeks before prepaying the loan. This notice letter can either be seen as an anticipatory breach of the contract, since plaintiff had no right under the contract to prepay the loan without giving ninety days written notice, or it can be deemed an offer to modify the contract. Defendant chose to view plaintiff's late notice as an offer to modify and issued its payoff letter as a counter-offer, permitting prepayment only if plaintiff paid the interest defendant would have earned if prepayment were made on proper notice. In exchange, defendant agreed to permit the prepayment and to charge the 3% prepayment charge plaintiff would have incurred if the prepayment had occurred in February 2008 rather than the 4% prepayment charge defendant was entitled to receive under the CMEA on the closing date of November 19, 2007. The difference between the additional interest and 3% charge and the 4% charge was \$4,570.43. By paying off the loan in accordance with the payoff letter, plaintiff simply accepted defendant's counter-offer.

Defendant did not breach the contract because it had no duty to perform under the contract absent ninety days written notice of plaintiff's intention to prepay, a condition plaintiff admittedly failed to satisfy.

The remainder of plaintiff's claims should likewise be dismissed as without merit. These claims are derivative. To the extent the contract claim fails, these claims based on the same facts, must fail. Claims for unjust enrichment and restitution sound in quasi-contract which have no application where the parties have entered into a contract. And, plaintiff is not entitled to declaratory judgment since it would have an adequate remedy in contract if its claims had any merit. Finally, although plaintiff may demand punitive damages where defendant engaged in intentional or reckless tortious conduct, the mere breach of a contract does not warrant punitive

[* 4]
damages.

Plaintiff's Opposition

The Complaint asserts five causes of action: (1) breach of contract; (2) unjust enrichment; (3) declaratory judgment that defendant's conduct breached the CMEA and constituted an unlawful penalty consisting of unearned and excess interest; (4) restitution; and (5) punitive damages.

Significantly, defendant's motion does not in any way directly challenge the sufficiency of the plaintiff's first cause of action for breach of contract or allege in any substantive manner that same fails to state a cause of action. The motion does not dispute that plaintiff has stated a cause of action for breach of contract, but instead merely raises a series of arguments which, in essence, may constitute defenses to the breach of contract.

Defendant asserts that the "payoff letter" annexed to the Complaint was not a typical, garden variety, run-of-the-mill payoff letter but was, in actuality, an *offer* to enter into a modification of the CMEA. But, a motion to dismiss relying on documentary evidence must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim. Defendant's documentary evidence is insufficient to meet defendant's burden to conclusively establish a defense or the absence of a factual dispute. Instead, defendant's motion merely raises a series of arguments, interpretations, and conclusions purporting to offer a proper construction of the disputed provision of the CMEA which is at issue in the action and the intent of the parties with respect thereto.

The payoff letter makes no mention of an "offer," makes no mention of a "modification" and neither contains a signature of the plaintiff nor provides a place for plaintiff to indicate his

agreement to this supposed “modification.” The payoff letter does not refer to “consideration” for a modification, but instead adds additional amounts due - not provided for in the CMEA, and denotes such amounts as additional “interest.” There are no “terms” discussed in the payoff letter.

Indeed, rather than conclusively establishing that the payoff letter was not what it expressly purported to be (i.e., a payoff letter) but was a disguised “modification agreement,” the payoff letter actually suggests that the defendant impermissibly charged amounts in the payoff letter in direct contravention, and outside of, the terms of the CMEA.

Defendant’s Reply Affirmation

Plaintiff does not dispute the authenticity of the documentary evidence submitted; instead, plaintiff insists that the legal significance of this documentary evidence is a matter of fact for a jury – this position is without merit. Furthermore, plaintiff’s intent in accepting the payoff letter is irrelevant to the legal effect of those actions. Indeed, the Appellate Division has held that a lender’s demand for additional payment when faced with an authorized prepayment request is deemed an offer to modify the contract, which the borrower accepts by repaying the amount demanded.

Further, it was not defendant who had breached the CMEA, rather the plaintiff by failing to give the required ninety days notice. Here, Dime acted in accordance with New York law in its demand to receive the interest Dime would have received had plaintiff given the proper ninety days notice. Finally, the cases cited by the plaintiff are simply inapplicable, and the complaint should be dismissed.

Analysis

CPLR 3211 (a)(1): Defense is Founded Upon Documentary Evidence

Pursuant to CPLR 3211 (a)(1), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that “a defense is founded upon documentary evidence.” Thus, where the “documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law,” dismissal is warranted (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 N.E.2d 511 [1994]). The test on a CPLR 3211 (a)(1) motion is whether the documentary evidence submitted “conclusively establishes a defense to the asserted claims as a matter of law” (*Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001] citing *Leon v Martinez*, 84 NY2d 83, 88, *supra*; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]).

Where documentary evidence and undisputed facts negate or dispose of the claims in the Complaint or conclusively establish a defense, dismissal may be granted pursuant to CPLR 3211 (a)(1) (*Biondi v Beekman Hill Housing Apt. Corp.*, 257 AD2d 76, 692 NYS2d 304 [1st Dept 1999]; *Kliebert v McKoan*, 228 AD2d 232, 43 NYS2d 114 [1st Dept 1996]; *Gephardt v Morgan Guaranty Trust Co. of N.Y.*, 191 AD2d 229, 594 NYS2d 248 [1st Dept 1993]; *Juliano v McEntee*, 150 AD2d 524, 541 NYS2d 232 [1st Dept 1989]; *see also Leon v Martinez, supra*; *Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]).

CPLR 3211 (a)(7): Dismiss for Failure to State a Cause of Action

In determining a motion to dismiss, the Court’s role is ordinarily limited to determining whether the Complaint states a cause of action (*Frank v DaimlerChrysler Corp., supra*). The

standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the Court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR § 3026). On a motion to dismiss made pursuant to CPLR 3211, the Court must “accept the facts as alleged in the Complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory” (*Leon v Martinez, supra*). However, in those circumstances where the bare legal conclusions and factual allegations are “flatly contradicted by documentary evidence,” they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp., supra, affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan, supra, lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996]), and the criterion becomes “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez, supra; Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept 1992], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort]).

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a)(7) where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the Complaint (*see Guggenheimer v. Ginzburg, supra; R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS.2d 532 [1st Dept 1989]). Affidavits submitted by a plaintiff may be considered for the limited purpose of remedying defects in the Complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]; *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]).

On a motion to dismiss directed at the sufficiency of the Complaint, the plaintiff is afforded the benefit of a liberal construction of the pleadings: “The scope of a Court’s inquiry on a motion to dismiss under CPLR 3211 is narrowly circumscribed” (*1199 Housing Corp. v International Fidelity Ins. Co.*, NYLJ January 18, 2005, p. 26 col.4, *citing P.T. Bank Central Asia v Chinese Am. Bank*, 301 AD2d 373, 375 [2003]), the object being “to determine if, assuming the truth of the facts alleged, the Complaint states the elements of a legally cognizable cause of action” (*id. at 376; see Rovello v Orofino Realty Co., supra*).

It is the movant who has the burden to demonstrate that, based upon the four corners of the Complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (*see Leon v Martinez, supra; Guggenheimer v Ginzburg, supra; Salles v Chase Manhattan Bank*, 300 A.D.2d 226, 228, 754 N.Y.S.2d 236 [1st Dept 2002]).

Contract Interpretation

Courts must construe a contract in a manner that avoids inconsistencies and reasonably harmonizes its terms (*James v. Jamie Towers Housing Co., Inc.*, 294 A.D.2d 268, 743 N.Y.S.2d

85 [1st Dept 2002]; *Barrow v Lawrence United Corp.*, 146 AD2d 15, 18, 538 NYS2d 363 [3d Dept 1989]), remaining “consistent[] with the over-all manifest purpose of the ... agreement.” The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties’ intent (*see Slatt v. Slatt*, 64 NY2d 966, 967, 488 NYS2d 645, *rearg denied* 65 NY2d 785, 492 NYS2d 1026 [1985]). “The best evidence of what parties to a written agreement intend is what they say in their writing” (*Slamow v. Del Col*, 79 NY2d 1016, 1018, 584 NYS2d 424 [1992]). Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*see e.g. R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32, 744 NYS2d 358, *rearg denied* 98 NY2d 693, 747 NYS2d 411 [2002]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]).

Furthermore, a contract is unambiguous if the language it uses has “a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion” (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355, 413 NYS2d 352 [1978], *rearg denied* 46 NY2d 940, 415 NYS2d 1027 [1979]). Thus, if the agreement on its face is reasonably susceptible of only one meaning, a Court is not free to alter the contract to reflect its personal notions of fairness and equity (*see e.g. Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514, 520, 640 NYS2d 472 [1996]; *First Natl. Stores v. Yellowstone Shopping Ctr.*, 21 NY2d 630, 638, 290 NYS2d 721, *rearg denied* 22 NY2d 827, 292 NYS2d 1031 [1968]).

Ultimately, the aim is a practical interpretation of the language employed so that there be a realization of the parties’ “reasonable expectations” (*see Sutton v East River Sav. Bank*, 55 NY2d 550, 555, 450 NYS2d 460 [1982]).

The CMEA is clear and unambiguous. It states in part at pp. 7-8:

The unpaid balance of the Mortgage Debt may be prepaid in whole after the date hereof on not less than Ninety (90) days' written notice, and upon paying, in addition to the principal sum then outstanding, plus accrued interest to date of such prepayment, and all other unpaid charges, a prepayment charge in an amount equal to a percentage of the amount so prepaid, based on the following schedule, during:

- . . . 4th Yr. - A 4% prepayment charge;
- 5th Yr. - A 3% prepayment charge; . . .

If defendant simply relied on this language of the CMEA and calculated the amounts due as expressly delineated in the CMEA, defendant would be entitled to dismissal based on documentary evidence. But that is not what occurred. Instead, defendant provided plaintiff with a payoff calculation schedule reflecting its modification of the terms of the CMEA.

As explained in *Friends Realty Assoc., LLC v Wells Fargo Bank*, 40 AD3d 287 (1st Dep 2007) (quoting *Arthur v Burkich*, 131 AD2d 105, 107 (3d Dept 1987)), it has been settled law since the early 19th century that a mortgagor has no right to pay off his obligation prior to its stated maturity date in the absence of a prepayment clause in the mortgage or contrary statutory authority *Troncone v Canelli*, 147 AD2d 633; *Matter of Arthur v Burkich*, 131 AD2d 105; *Poughkeepsie Galleria Co. v Aetna Life Ins. Co.*, 178 Misc 2d 646). "Prepayment can impose daunting economic sacrifices upon a mortgagee, not the least of which include the loss of the bargained for rate of return, an increased tax burden, unanticipated costs occasioned by the need to reinvest the principal, and for those creditors anxious to ensure regular payments not unlike an annuity, it undoes the mortgagee's purpose in making the loan" (*Matter of Arthur v Burkich*, *supra*, at 107). Thus, the right to prepay must be readily discernible from the mortgage instrument or from the parties' conduct (see, *Matter of Arthur v Burkich*, *supra*).

As the mortgage documents did not grant plaintiff herein an unambiguous right to prepay the debt (*see, Matter of Arthur v Burkich, supra*), defendant was entitled to demand the prepayment penalty (*see, Hughley v Gillespie, 219 AD2d 584; Feldman v Kings Highway Sav. Bank, 278 App Div 589, affd 303 NY 675*).

However, in the instant case, there is no “payoff letter,” demanding the prepayment penalty. Plaintiff was provided simply a payout calculation sheet with the modified amounts due: no explanation. Defendant unilaterally decided to *interpret* plaintiff’s late notice as an offer to modify and issued its payout sheet. There is nothing that advises the plaintiff that this is a counter offer, permitting prepayment only if plaintiff paid the interest defendant would have earned if prepayment were made on proper notice.

The case of *In the Matter of Cathedral Properties Corp. v Birnbaum et al.*, 44 AD3d 852 (2d Dept 2007) is instructive. In that case, the Court reiterates that “A mortgagor has no right to pay off his or her obligation prior to its stated maturity date in the absence of a prepayment clause in the mortgage or contrary statutory authority (*see Russo Enters. v Citibank, 266 AD2d 528, 529 [1999]; Troncone v Canelli, 147 AD2d 633 [1989]*). However, the Court continued that “The appellants correctly contend that Blinbaum’s conduct in preparing a ‘Mortgage Analysis’ showing a payoff amount for the wrap mortgage constituted, at most, an offer to accept prepayment in exchange for a 2% prepayment penalty, which offer was rejected. In any event, as the extension agreement provides that it cannot be changed orally, the ‘Mortgage Analysis’ could not change the terms of the wrap mortgage because it is unsigned (*see General Obligations Law § 15-301 [1]*)”.

Likewise, in the instant case, the defendant’s payout calculation constituted, at most, an

offer to accept prepayment in exchange for a prepayment penalty. In *In the Matter of Cathedral Properties Corp.*, petitioner rejected the offer and sought court intervention. In the instant case, plaintiff settled the mortgage pursuant to the payout calculation provided by defendant, and thereafter, (twelve days later), by letter dated November 27, 2007, expressly contested defendant's modification. Plaintiff's payout of the mortgage under the duress of closing a deal to transfer title to the property, and timely objection, does not constitute a acceptance of the defendant's modification.

Unjust Enrichment and Restitution

It is well settled that "plaintiff[] cannot recover for unjust enrichment while simultaneously alleging the existence of an express contract covering the same subject matter" (*Sergeants Benev. Ass'n Annuity Fund v Renck*, 19 AD3d 107, 796 NYS2d 77 [1st Dept 2005] citing *MJM Adv. v Panasonic Indus. Co.*, 294 AD2d 265, 266, 741 NYS2d 874 [2002] and *Hohenberg Co. v Iwai New York*, 6 AD2d 575, 578, 180 NYS2d 410 [1958]). The existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi-contract for events arising out of the same subject matter (*PKO Television, Ltd. v Time Life Films, Inc.*, 169 AD2d 582, 564 NYS2d 434 [1st Dept 1991]). Thus, tort claims which are duplicative of a breach of contract claim may properly be dismissed (*23/23 Communications Corp. v General Motors Corp.*, 257 AD2d 367, 683 NYS2d 43 [1st Dept 1999]; see also *Apfel v Prudential-Bache Securities Inc.*, 81 NY2d 470 [1993] [finding that unjust enrichment on a quasi-contract theory was improperly reinstated where transaction was controlled by the express agreement of the parties and their rights and liabilities are to be determined solely on theories of breach of contract]).

Further, a breach of contract claim may not be considered a tort unless a legal duty independent of the contract, *i.e.*, one arising out of circumstances extraneous to, and not constituting elements of, the contract itself has been violated (*Brown v Brown*, 12 AD3d 176, 785 NYS2d 417 [1st Dept 2004]).

Moreover, restitution is related to the quasi-contract claim for unjust enrichment. As restitution is inextricably tied to unjust enrichment, the relief sought is foreclosed where a valid contract exists. Further, in the case at bar, plaintiff does not allege a payment “under an erroneous belief induced by a mistake of fact that the terms of the contract required such payment” (*Restatement (First) of Restitution* § 18 [1937]), which may allow for restitution under the appropriate circumstances.

Therefore, in light of this Court’s finding that an express contract exists (the CMEA agreement), and this Court’s finding that the payoff letter does not constitute a proper modification of the CMEA agreement, plaintiff may not pursue its unjust enrichment and restitution causes of action, and they are dismissed.

Punitive Damages: Tort Case

“Punitive damages are awarded in tort actions ‘[w]here the defendant’s wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime’ ” (*Prozeralik v Capital Cities Communications, Inc.*, 82 NY2d 466, 605 NYS2d 218, 626 NE2d 34 [1993], *quoting* Prosser and Keeton, *Torts* § 2, at 9 [5th ed. 1984]). That author also teaches that: “Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or ‘malice,’ or a

[* 14]

fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton” (Prosser and Keeton, Torts § 2, at 9-10 [5th ed.1984]).

Thus, the harmful conduct must be “intentional, malicious, outrageous, or otherwise aggravated beyond mere negligence” (*McDougald v Garber*, 73 NY2d 246, 538 NYS2d 937, 536 NE2d 372 [1989]). Furthermore, an award of punitive damages must be supported by “clear, unequivocal and convincing evidence” (*Munoz v Poretz*, 301 AD2d 382, 753 NYS2d 463 [1st Dept 2003]).

Further, it is well settled that the purpose of punitive damages is not to remedy private wrongs but to vindicate public rights (*see Garrity v Lyle Stuart, Inc.*, 40 NY2d 354, 358 [1976]). Thus, a private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he was aggrieved and which is actionable as an independent tort, but also that such conduct was part of a pattern of similar conduct directed at the public generally (*see New York University v Continental Ins. Co.*, 87 NY2d 308, 315-316 [1995]; *Rocanova v Equitable Life Assurance Society of United States*, 83 NY2d 603, 613 [1994]; *RTC Industries, Inc. v Goodtimes Home Video Corp.*, 1997 WL 35524 [SDNY 1997]).

“Punitive damages are available only in those limited circumstances where it is necessary to deter defendant and others like it from engaging in conduct that may be characterized as ‘gross’ and ‘morally reprehensible’ and of ‘such wanton dishonesty as to imply criminal indifference to civil obligations’ ” (*New York University v Continental Ins. Co.*, *supra*, at 316).

Such damages, however, may be recovered in addition to compensatory damages upon a

[* 15]

showing that conduct complained of was part of a pattern of similar conduct directed at the public generally, aggravated by evil or a wrongful motive or that there was wilful and intentional misdoing, or a reckless indifference equivalent intentional wrongdoing (*Walker v Sheldon*, 10 N.Y.2d 401, 404-405 [1961]; see, also *Rocanova v Equitable Life Assur. Soc.*, *supra*).

“Even where there is gross negligence, punitive damages are awarded only in ‘singularly rare cases’ such as cases involving an improper state of mind or malice or cases involving wrongdoing to the public” (*Karen S. "Anonymous" v Streitferdt*, 172 AD2d 440, 441, quoting *Rand & Paseka Mfg. Co. v Holmes Protection*, 130 AD2d 429, 431, *lv denied* 70 NY2d 615).

This Court finds that at this point in the proceeding, plaintiff may maintain its claim for punitive damages. Specifically, in its Complaint, plaintiff states:

. . . Dime has and continues to impose similar penalties upon its customers with prepayment notice requirements in their mortgages. Neither the CMEA nor, upon information and belief, any prepayment notice provisions in other mortgages issued by Dime, disclose that Dime will charge a penalty calculated as a function of additional per diem interest if the specified number of days of prepayment notice is not provided by the mortgagor . . . Dime’s conduct breached the CMEA and is against public policy . . . [paragraphs 33-35 of the Complaint]

With respect to a CPLR 3211 motion, the Court accepts the facts as alleged in the Complaint as true (*see Leon v Martinez, supra*). Plaintiff has stated a claim that Dime’s actions violated public policy and that Dime “continues to impose similar penalties upon its customers. . . .” This fits into the theory that the alleged conduct was of an egregious nature aimed not solely at this plaintiff, but at the public, generally (*see American Transitions. Co. v Associated International Ins. Co.*, 261 AD2d 251 [1st Dept 1999]).

However, as noted above, New York law permits a lender to demand a prepayment

penalty, there is no public harm in defendant's policy of a penalty for prepayment. Yet, to the extent that Dime provides its customers with improper modifications, *i.e.* payout calculation sheets with the modified amounts due, the plaintiff's cause of action for punitive damages must remain. Therefore, based upon the four corners of the Complaint liberally construed in favor of the plaintiff, the movant has not met its burden to defeat this claim showing that the pleading states no legally cognizable cause of action for punitive damages (*see Leon v Martinez, supra; Guggenheimer v Ginzburg, supra; Salles v. Chase Manhattan Bank. supra*).

Declaratory Judgment

Plaintiff's third cause of action, plaintiff argues:

... Dime's conduct breached the CMEA and is against public policy and constitutes an unlawful penalty consisting of unearned and excess interest. Dime's conduct is a violation of New York Common Law, Uniform Commercial Code and New York State Banking Law.

To the degree plaintiff's third cause of action is duplicative of plaintiff's first cause of action (breach of the CMEA), continuation of this cause of action is unwarranted. However, to the degree plaintiff's third cause of action seeks additional relief related to public harm, said cause of action may be maintained.

Restitution of the penalty paid, in the amount of \$37,477.57 plus interest thereon (plaintiff's fourth cause of action), is simply a damage demand.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendant Dime Savings Bank of Williamsburgh for an order pursuant to CPLR 3211(a)(1) and (7), dismissing the Complaint of plaintiff 235 East 4th Street LLC, is **granted to the extent that** the following causes of action are dismissed:

Plaintiff's second cause of action for unjust enrichment;

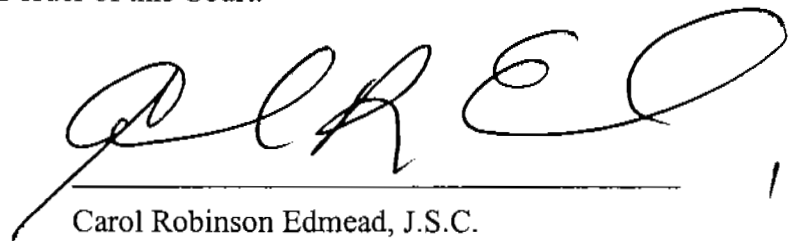
Plaintiff's fourth cause of action for restitution; and it is further

ORDERED that counsel shall appear before this Court for a preliminary conference on Tuesday, September 16, 2008, Part 35, 60 Centre Street, Room 438, New York, New York; and it is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

This constitutes the decision and order of this Court.

Dated: July 18, 2008



Carol Robinson Edmead, J.S.C.

**CAROL EDMÉAD
J.S.C.**

FILED
JUL 21 2008
COUNTY CLERK'S OFFICE
NEW YORK