

Deutsche Bank Natl. Trust Co. v Caserma

2008 NY Slip Op 32081(U)

July 15, 2008

Supreme Court,, Nassau County

Docket Number: 0481-08/

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

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

Present:

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

-----X
**DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR HSI ASSET SECURITIZATION
CORPORATION 2006-OPT2 MORTGAGE
PASS-THROUGH CERTIFICATES, SERIES
2006-OPT2,,**

TRIAL TERM PART: 48

Plaintiff,

INDEX NO.: 000481/08

-against-

**MOTION DATE: 6-26-08
SUBMIT DATE: 6-26-08
SEQ. NUMBER - 001**

**DENNIS A. CASERMA; RANCES L. BURNS;
HOUSEHOLD FINANCE REALTY
CORPORATION OF NEW YORK, AND "JOHN
DOE #1" FICTITIOUS AND UNKNOWN TO THE
PLAINTIFF, THE PERSON OR PARTIES
INTENDED BEING 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 6-5-08.....1**
- Affirmation in Opposition, dated 6-24-08.....2**

The plaintiff, Deutsche Bank International Trust Company¹, moves for an order

¹ The plaintiff, Deutsche Bank National Trust Company, is the successor in interest to Option One Mortgage Corporation, the entity with which the defendant's executed the subject note and mortgage (see Affirmation in Support at ¶4, Exh, A; see also Affidavit in Support at ¶5).

granting the following forms of relief: an order directing the entry of summary judgment in favor of the plaintiff and against the defendant Dennis Caserma, for the relief as demanded in the complaint; an order denying the defendant's counterclaims in their entirety; an order directing the appointment of a referee to compute; and an order amending the title of the within action and deleting therefrom the defendants designated as John Doe #1 through John Doe #10.

On September 27, 2005 the defendant's Dennis Caserma and Frances L. Burns executed a note and mortgage in connection with the premises located at 30 Grove Street, Hicksville, New York (*see* Affirmation in Support at Exh. A; *see also* Affidavit in Support at ¶4). Pursuant to the terms thereof, the defendants were obligated to pay Option One Mortgage Corporation the monthly sum of \$2,217.74 over the terms of the loan which was due on the first day of each month (*see* Affirmation in Support at Exh. A). The mortgage and note also provided for an annual rate of interest of 8.25% (*id.*).

The plaintiff alleges the defendants have failed to make the required payments under the terms of the mortgage and have been in default since July 1, 2007 (*id.* at ¶14). As a result, on or about January 16, 2008, the plaintiff commenced the underlying action seeking to foreclose on the subject premises (*id.* at ¶6). While defendant Dennis Caserma has appeared in the action by way of service of a Verified Answer, neither Defendant Frances L. Burns nor Household Finance Realty Corporation have appeared in the action although both were duly served (*id.* at ¶9; *see also* Exhs. B, E).

Counsel for the plaintiff argues that defendant's Caserma and Burns were contractually bound by the terms of the note and mortgage to remit the required monthly

payments and that as a result of their failure to do so the plaintiff has a right to foreclose on the subject mortgage (*id.* at ¶¶13,14). Counsel for the plaintiff annexes, *inter alia*, a copy of the relevant note and mortgage signed by both the defendant's and an affidavit of Cindi Ellis, an Assistant Secretary employed by Option One Mortgage Corporation (*id.* Exh. A; *see also* Affidavit in Support at ¶1). Ms. Ellis attests that upon review of the documents relevant to the within action, the defendants executed a mortgage and note on September 27, 2005 in the principal sum of \$295,200 whereby Dennis A. Caserma and Frances L. Burns promised to pay Option One Mortgage Corporation monthly payments of principal, interest and real estate taxes on the first day of every month (*id.* at ¶4). Ms. Ellis avers that the defendants have defaulted on their obligation by failing to render any payments since July 1, 2007 (*id.* at ¶7). Plaintiff's counsel additionally argues that Answer interposed by the defendant consists primarily of general denials which are insufficient to defeat a motion for summary judgment and that the two affirmative defenses therein contained are unsubstantiated (*see* Affirmation in Support at ¶10).

Defendant Casemera opposes the application by way of an attorney's affirmation and argues that he was promised a guaranteed interest rate of 7.45% but notwithstanding such promise, on the date of the closing he was informed that the interest rate would be 8.25% (*see* Affirmation in Opposition at ¶3). The defendant argues that this increase in interest is in contravention of 15 USC §1635 of the Truth in Lending Act and as a result he has a right to rescind the transaction (*id.* at ¶5). The defendant further alleges that he did not receive a Good Faith Estimate of Settlement Charges three days prior to the closing in violation of Regulation Z of section 226 of the Code of Federal Regulations (*id.* at ¶6).

A plaintiff seeking summary judgment in a mortgage foreclosure action bears the initial burden of demonstrating that the defendant executed the mortgage note and failed to make the required payments thereon. *Mahopac Nat. Bank v Baisley*, 244 AD2d 466 (2d Dept 1997); *Home Sav. Bank v Schorr Bros. Development Corp.*, 213 AD2d 512 (2d Dept 1995). Upon the requisite showing by the plaintiff, the burden thereafter shifts to the defendant who must allege facts, the existence of which demonstrates a meritorious defense sufficient to defeat the plaintiff's application. *Fleet Mtg. Corp. v Rebich*, 227 AD2d 518 (2d Dept 1996).

In the instant matter, the plaintiff has met this burden by demonstrating that the defendant executed the subject note and mortgage on September 27, 2005 and subsequently defaulted thereon by failing to make the contractually required payments. The plaintiff having demonstrated its entitlement to judgment as a matter of law, the burden now shifts to the defendant to proffer a *bona fide* defense.

Initially, with respect to the defendant's opposition, offered in the form of an attorney's affirmation, the Court notes that while an attorney's affirmation is generally insufficient to defeat a motion for summary judgment, such an affirmation can be employed as a vehicle to introduce other competent evidence. *Zuckerman v City of New York*, 49 NY2d 557 (1980). Here, as counsel's affirmation makes particular reference to the allegations in the defendant's Verified Answer, which is considered a responsive affidavit for purposes of summary judgment, this Court afforded consideration to the contents thereof. CPLR §105[u]; *Hladczuk v Epstein*, 98 AD2d 990 (4th Dept 1983); *Travis v Allstate Ins. Co.*, 280 AD2d 394 (1st Dept 2000).

[* 5]

The Federal Truth in Lending Act [hereinafter TILA] was enacted by Congress to provide consumers with certain protections in consumer credit transactions by requiring the creditor to provide meaningful disclosure of the terms of the transaction including, *inter alia*, the amount being financed and the rate of interest (15 USC 1601 *et seq*; 12 CFR § 226.18). Regulation Z, as embodied in 12 CFR Part 226, constitutes a detailed and comprehensive authoritative compendium of rules promulgated by the Board of Governors of the Federal Reserve Board to implement the provisions of TILA.

Of particular relevance here is 12 CFR §226.18(c)(1) entitled Contents of disclosures, which mandates that lenders provide borrowers with a written itemization of the amount being financed. The express terms of this section clearly provide that in lieu of a written itemization, “Good faith estimates of settlement costs provided for transactions subject to the Real Estate Settlement Procedures Act (12 U.S.C. 2601 *et seq.*) may be substituted for the disclosures required by paragraph (c) of this section.” This required disclosure must be effected before consummation of the transaction, which is defined elsewhere in Regulation Z as “the time the consumer becomes contractually obligated on a credit transaction” (*see* 12 CFR §226.17[b]; 12 CFR § 226.2[13]).

Addressing now the substance of the defendant’s two opposition arguments, the Court finds each to be insufficient to defeat the plaintiff’s application. The defendant’s first argument that he was promised a mortgage loan bearing an interest rate of 7.45% is not supported by the record, a review of which reveals that on August 2, 2005, the defendant was provided with a Federal Truth in Lending Disclosure Statement which specifically indicated that the information therein contained was preliminary and that the amounts recited

[* 6]
were estimates. Additionally, it is unclear to this Court exactly upon what the defendant is basing his claim that he was promised an interest rate of 7.45%. The amount of interest stated in the initial disclosure statement dated August 2, 2005, is clearly noted as 7.504% and there is an absence of any other evidence that the defendant was issued a firm commitment for a guaranteed interest rate of 7.45%.

Moreover, 15 USCA §1635, the statute upon which the defendant relies to rescind the subject agreement is not applicable to the circumstances extant. In the instant matter, the subject transaction was a residential mortgage transaction which is defined in the statute as “. . . a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer’s dwelling to finance the acquisition or initial construction of such dwelling (15 USC §1602[w]). The express terms of both the statute relied upon by the defendant and the accompanying implementing regulation expressly exempt “residential mortgage transactions” from an obligor’s right of rescision (15 USC §1635[e][1]; 12 CFR §226.15[f][1]).

The defendant’s second argument that he never received a Good Faith Estimate three days prior to the closing on the subject premises and that same is a violation of Regulation Z is equally unavailing. A review of the documents submitted by the defendant in opposition to the plaintiff’s application reveals that the defendant acknowledges receipt of Good Faith Estimate on August 2, 2005, several weeks prior to the execution of the note and mortgage in issue. Thus, the record is devoid of any evidence that the disclosure provisions of Regulation Z were in any way violated (12 CFR § 226.2[13]; 12 CFR §226.17[b]; 12 CFR §226.18[c][1]).

[* 7]

Based upon the foregoing, those branches of the plaintiff's application seeking summary judgment and the appointment of a referee to compute are hereby GRANTED. A referee to compute is hereby appointed in the ORDER GRANTING SUMMARY JUDGMENT submitted by the plaintiff simultaneously with the instant application.

That branch of the plaintiff's application seeking to amend the caption is hereby GRANTED and the caption is deemed amended deleting therefrom those defendant's designated as John Doe #1 through John Doe #10.


That branch of the plaintiff's application which seeks dismissal of the defendant's counterclaims is DENIED as moot. A review of the defendant's verified answer indicates that no counter claims were properly interposed pursuant to the applicable statutory provisions and that the defendant stated only that he "desires to retain his rights with respect to any counterclaims against the plaintiff with respect to the affirmative defenses." (CPLR§3019(a);CPLR §3013).

This constitutes the Decision and Order of the Court.

All applications not specifically addressed herein are deemed denied.

ENTER

DATED: July 15, 2008


HON. DANIEL PALMIERI
Acting Supreme Court Justice

TO: Shapiro & DiCaro, LLP
By: John A. DiCaro, Esq.
Attorney for Plaintiff
250 Mile Crossing Boulevard, Ste. One
Rochester, NY 14624

ENTERED
JUL 21 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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