SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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ROXANN GIORDANO,

Plaintiff,

-against-

ROSE MARIE GIAMMARINO and "JOHN DOE No. 1" through "JOHN DOE No. 10", the last ten names being fictitious and unknown to the Plaintiffs, the Persons or Parties intended being the Tenants, Occupants, Persons or Corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint known as 226 Greencroft Avenue, Staten Island, New York,

*Defendant*s,

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ROSE MARIE GIAMMARINO,

Third Party Plaintiff,

-against-

SUMMIT INVESTMENTS LOAN CORPORATION d/b/a E-ISLAND MORTGAGE, MARC LaMASSA, JOSEPH CRAPANZANO, NASSER ALAMEDDIN, MONARCH MORTGAGE SERVICES, CERTIFIED ABSTRACT CORPORATION and ANTHONY M. BELLINI,

Third-Party Defendants.

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TP 9

Present:
Hon. Anthony I. Giacobbe

DECISION AND ORDER

Index No. 102961/06
Motion Nos. 007, 008

Index No. A102961/06

The following papers numbered 1 to 4 were marked fully submitted on the 26th day of September, 2008:

Notice of Motion to Withdraw as Counsel to Defendant/Third-Party Plaintiff Rose Marie Giammarino with supporting papers (dated August 29, 2008) 1

Notice of Motion for a Preliminary Injunction by Plaintiff Roxann Giordano with supporting papers (dated September 2, 2008) 2

Affirmation in Opposition to Plaintiff's Motion for a Preliminary Injunction with supporting papers (dated September 10, 2008)	3
Plaintiff's Affirmation in Reply (dated September 25, 2008)	4

Upon the foregoing papers, the motion (No. 007) to withdraw as counsel to defendant/third-party plaintiff ROSE MARIE GIAMMARINO is denied, as is plaintiff's motion (No. 008) for a preliminary injunction.

Plaintiff ROXANN GIORDANO commenced this foreclosure action as a result of defendant ROSE MARIE GIAMMARINO's alleged failure to make the required payments on a mortgage executed by her on March 3, 2006 in the principal sum of $350,000.00. By way of background, it appears that defendant ROSE MARIE GIAMMARINO (hereinafter "defendant") is the record owner of 226 Greencroft Avenue in Staten Island, the subject of this foreclosure action. It further appears that she was facing foreclosure when she obtained the subject mortgage from plaintiff. Many of the mortgage terms appear to be in dispute, as are the allegedly excessive fees charged at the closing, the identity of all of the parties involved in the refinancing, and the respective roles that each played in the refinancing which culminated in defendant's execution of this mortgage.

The complaint[1] alleges, *inter alia*, that the mortgage in question was for $350,000.00, with interest at a fixed rate of 12%, that defendant was required thereunder to pay interest-only for the term of one year, and that the entire principal would thereafter become immediately due and payable. It is also alleged that: (1) defendant defaulted on the loan by failing to make any of the required payments; (2) she knowingly misrepresented her monthly income from a pension or retirement account and rental income in completing the loan application; and (3) the third-party defendants

[1] By Decision and Order dated July 9, 2008, plaintiff was granted leave to amend the complaint; service thereof, and answers thereto, should have been completed well before the date of the instant Decision and Order.

SUMMIT INVESTMENTS LOAN CORPORATION d/b/a E-ISLAND MORTGAGE, MARC LAMASSA and JOSEPH CRAPANZANO either conspired with defendant to defraud plaintiff or falsified the loan application themselves.

In her answer, defendant has asserted numerous defenses and counterclaims, including the claim that plaintiff and the third-party defendants acted together to procure her assent to the subject loan. Defendant further claims that as a result of this alleged collusion, she was persuaded to agree to make payments of $3,500.00 per month on a monthly income of only $1,776.00; that she was misled as to the closing costs ($51,370.00) for the one-year loan; and that other exorbitant fees were charged at closing, *e.g.*, a $10,500.00 "loan origination fee", a $500.00 "application fee", a $750.00 "underwriting fee" and a $650.00 "processing fee", all of which was purportedly paid to plaintiff out of the loan proceeds. According to defendant, none of these fees had been disclosed prior to the closing. It is also claimed that while the settlement statement from the closing indicates that $31,102.32 of the loan proceeds were paid to defendant in order to help with the monthly payments, she was nevertheless required to sign that check over to third-party defendants LAMASSA and CRAPANZANO, with the result that none of this money was ever applied to her monthly mortgage payments.

Finally, defendant alleges that: (1) the loan is usurious and should be declared void and unenforceable under General Obligations Law 5-501; and (2) plaintiff violated the Federal Home Ownership and Equity Protection Act ("HOEPA") by providing, *inter alia*, a high-cost loan to defendant and extending credit based on defendant's collateral without any regard to her repayment ability, requiring a balloon payment on a loan whose term was less than five years, and failing to provide federally-mandated disclosures prior to the closing.

In its current application, Staten Island Legal Services ("SILS") seeks to withdraw as counsel for defendant on the ground that she has repeatedly failed to comply with material terms of their retainer agreement notwithstanding repeated notification of same. As a result, SILS claims that defendant has made it unreasonably difficult to effectively carry out its role as her attorneys. According to SILS, it has already performed numerous services for defendant which have enabled her to remain in her home, and their withdrawal would not materially affect defendant's interest since she is in the process of hiring a private attorney to represent her. No papers have been submitted in opposition to this motion.

Plaintiff's motion seeks a preliminary injunction requiring defendant to deposit the rental income collected from the mortgaged premises into Court. According to plaintiff, she has not received any payments on the mortgage, and fears that if these rental payments are not paid into the Court, they will be dissipated. As a result, she believes that any judgment that she may ultimately obtain would be uncollectible. Plaintiff further contends that she is not chargeable with any wrongdoing, and that the actual wrongdoers in this transaction are third-party defendants MARK LAMASSA and JOSEPH CRAPANZANO, both of whom have been sentenced or have served time in prison for drug violations, as well as the forging of checks and other documents in a Florida real estate deal.

In opposition to plaintiff's request for interim relief, defendant contends that plaintiff faces no threat of irreparable harm, that the equities do not favor plaintiff, and that she cannot demonstrate a likelihood of success on the merits. According to defendant, the foreclosure action is highly vulnerable to allegations of usury and several other violations of state and federal law. In addition, defendant claims that plaintiff's cause of action for fraud based on defendant's intentional inflation

of her monthly income in order to obtain a high-cost, one-year loan which she clearly could not afford is dubious on its face. In addition, defendant contends that plaintiff's inclusion of a claim for unjust enrichment was not authorized by this Court in its Decision and Order dated July 9, 2008.

As for plaintiff's claim of equitable harm, defendant contends that plaintiff is merely attempting to divert the Court's attention from the illegal loan that she extended by blaming the third-party defendants. According to defendant, plaintiff is herself guilty of violating state law against usury by charging excessive interest on the loan, as well as federal law by, *e.g.,* charging exorbitant fees and extending an unconscionable loan. Finally, defendant maintains that plaintiff has failed to establish that she will suffer irreparable harm without a preliminary injunction. According to defendant, the funds which plaintiff seeks to recover are under no threat of imminent harm or loss, as her foreclosure claim can be fully satisfied through the sale of the subject property. In addition, there has been no proof that defendant intends to defraud plaintiff by disposing of any funds prior to the conclusion of this case.

The motions are decided as follows.

With regard to the motion of SILS to withdraw as counsel to defendant, while CPLR 321(b)(2) permits an attorney of record to move for leave to withdraw by order of the Court, there must nevertheless be a showing of good cause and reasonable notice before the motion will be granted (*see, George v. George*, 217 AD2d 913 [4th Dept. 1995]). Here, however, counsel's claim that defendant has breached her retainer agreement, and that such conduct has rendered it unreasonably difficult for SILS to effectively carry on as her attorney (*see,* Code of Professional Responsibility DR 2-110[C][1][d], [22 NYCRR 1200.15(c)(1)(iv)]), is devoid of any factual allegations regarding the specific nature of defendant's action (*see*, *Cashdan v. Cashdan*, 243 AD2d

598 [2nd Dept. 1997]; Catrone v. Catrone, 92 AD2d 559 [2nd Dept. 1983]). Given this want of evidence, the motion to withdraw as counsel is denied.[2]

Turning to plaintiff's motion for a preliminary injunction, requiring defendant to deposit rental income from the mortgaged premises into Court, pursuant to CPLR 6301, the moving party must establish a probability of success on the merits, a danger of irreparable harm absent the granting of an injunction, and a balance of the equities in the movant's favor (*see, Aetna Insurance Co. v. Capasso* , 75 NY2d 860, 862 [1990]). Plaintiff at bar has failed to satisfy this burden.

Here, the highly contested allegations of fraud and the claimed violation of both state and federal law render plaintiff's likelihood of success on the merits problematic. In addition, plaintiff has not established that she will suffer irreparable harm if her application is denied, since the only harm alleged is the potential inability to collect an award of money damages under circumstances where, as the mortgagor, she retains a security interest in the property upon which foreclosure is sought (*cf.*, *Sterling Fifth Associates v. Carpentille Corp., Inc.*, 5 AD3d 328, 330 [1st Dept. 2004]). Finally, with regard to a balancing of the equities, plaintiff has failed to establish that any harm which she may suffer in the absence of an injunction will be greater than that to which defendant will be exposed by the granting of same, or that the direction to pay rent into Court would operate to maintain the "status quo" between herself and defendant. Again, in the event of a judgment in plaintiff's favor, any assessment of damages can be satisfied from the proceeds of the sale of the mortgaged property.

Accordingly, it is

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[2] Parenthetically, without passing upon the method employed by movant-counsel to bring on the instant application or the manner of service utilized, the Court merely notes that such an application should be brought by order to show cause (*see,* CPLR 321, *Practice Commentaries by Vincent C. Alexander*, C321:2; *Wong v. Wong*, 213 AD2d 399 [2nd Dept. 1995]).

ORDERED that the motion by defendant and the motion by plaintiff are denied; and it is further

ORDERED that the attorneys of record for the respective parties shall appear on November 21, 2008, 12:00 pm in Part TP 9 for a conference, at which time the Court will expect substantial compliance with the Preliminary Conference Order dated February 8, 200[8] as well as the Court's Decision and Order dated July 9, 2008. In the event that defendant retains a private attorney, there must be compliance with CPLR 321(b)(1) as soon as is practicable.

E N T E R

Dated: October 30, 2008

J.S.C.