

**Ulster Sav. Bank v Parenti**

2008 NY Slip Op 33258(U)

December 8, 2008

Supreme Court, Greene County

Docket Number: 08972-08

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT  
ULSTER SAVINGS BANK,

COUNTY OF GREENE

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*Plaintiff,*

**DECISION and ORDER**

**RJI NO.: 19-08-3727**

**INDEX NO.: 0897-08**

-against-

RON PARENTI, MARGARET BARRIS,  
DARCY WOOD, WAYNE TAYLOR,  
TANYA REILEY,

*Defendants.*

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Greene County Supreme Court All Purpose Term, November 6, 2008  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

Gerald Roth, Esq.  
Stein, Weiner & Roth, L.L.P.  
Attorneys for Plaintiff  
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Carle Place, NY 11514

Ronald Parenti  
Defendant Pro Se  
P.O. Box 388  
375 Main Street  
Rosendale, NY 12472

**TERESI, J.:**

Plaintiff, Ulster Savings Bank, moves for summary judgment in this mortgage foreclosure action and to confirm the appointment of a referee to compute. Defendant, Ronald Parenti (hereinafter "defendant") opposes the motion. Because plaintiff demonstrated its entitlement to judgment as a matter of law and defendant raised no issue of material fact, plaintiff's motion for summary judgement is granted.

"Entitlement to a judgment of foreclosure may be established, as a matter of law, where a

mortgagee produces both the mortgage and unpaid note, together with evidence of the mortgagor's default, thereby shifting the burden to the mortgagor to demonstrate, through both competent and admissible evidence, any defense which could raise a question of fact." (HSBC Bank USA v. Merrill, 37 AD3d 899, 900 [3d Dept. 2007]; United Cos. Lending Corp. v. Hingos, 283 AD2d 764 [3d Dept. 2001]; Charter One Bank, FSB v. Leone, 45 AD3d 958 [3d Dept. 2007]).

Plaintiff's motion is supported by properly submitting both the mortgage and note. Plaintiff then, by affidavit of its collections officer, demonstrates defendant's default in paying the monthly charges thereunder. Such proof amply demonstrated plaintiff's entitlement to judgment as a matter of law, shifting the burden of proof to the defendant to raise a question of fact. (Merrill, supra at 900; Hingos, supra at 765). Moreover, defendant does not contest that he has been in default on his monthly payments since February 2008.

Defendant's answer set forth three affirmative defenses, none of which raise an issue fact on this motion. Defendant's first and second affirmative defenses allege that plaintiff failed to comply with the conditions of the note and mortgage, respectively. Defendant's third affirmative defense alleged that plaintiff improperly increased his monthly payments by seven hundred dollars, which he alleged caused him to fall behind in his monthly payments.

Defendant's opposition papers on this motion, however, fail to support any of the stated affirmative defense with any factual proof or legal argument. Relative to the third affirmative defense, defendant's opposition papers specifically contradict his claim that plaintiff improperly increased his monthly payment by seven hundred dollars. His affidavit in opposition alleges his monthly payment for principal and interest did not increase, but rather taxes and insurance payments, escrowed by the plaintiff, increased by \$398.35 within two years of his executing the

note and mortgage. Defendant has failed to raise an issue of fact on this motion relative to any affirmative defense pled in his answer. However, because “an unpleaded defense may be invoked to defeat a summary judgment motion”, the balance of defendant’s opposition papers must be examined. (Sheils v. County of Fulton, 14 AD3d 919 [3 Dept. 2005]).

Defendant’s opposition papers allege, in general terms, a defense based upon fraud. A fraud defense requires defendant to demonstrate a “representation of fact, which is either untrue and known to be untrue or recklessly made, and which is offered to deceive the other party and to induce them to act upon it, causing injury”. (Pidwell v. Duvall, 28 AD3d 829, 831 [3d Dept. 2006]). Defendant claims two specific representations of fact were fraudulent.

First, defendant claims plaintiff “pulled a bait and switch” by initially offering a fixed rate mortgage and then presenting an adjustable rate mortgage at closing. Defendant’s fraud claim is necessarily premised upon the initial offer of a fixed rate mortgage being fraudulent. However, defendant offers no proof that such initial offer was “known to be untrue or recklessly made” by plaintiff when they made such offer. Moreover, defendant acknowledges he was represented by counsel at the closing and acknowledges he signed the mortgage and its adjustable rate rider. His current claim of ignorance is belied by the documentary proof. As defendant’s claimed “misrepresentations are plainly inconsistent with the disclosures contained in the documents that defendant ultimately executed, defendant has failed to raise a question of fact in this regard.” (La Salle Bank Nat. Ass'n v. Kosarovich, 31 AD3d 904, 906 [3d Dept. 2006]).

Defendant’s second fraud claim is similarly unavailing. Defendant alleges that his monthly payment amount, as initially disclosed by plaintiff, was \$711.13. Defendant then alleges that such amount was increased at closing to \$803.10, and by March 2008 was \$1,201.45. Defendant does not allege that the mortgage’s principal and interest has increased at any time

(the first adjustment will not occur until February 2011), his only claim is that his escrowed items have increased. Defendant failed to demonstrate that plaintiff's initial monthly payment disclosure was "known to be untrue or recklessly made" when made by plaintiff. Moreover, the escrow items, which by their nature increase over time, could not have been disclosed with specificity on plaintiff's initial disclosure. Such item's increases had not yet been determined and are wholly dependent upon third parties. Defendant's allegations of fraud relative to the increase in his monthly payment are pure speculation, unsupported by any proof, and fail to raise a triable issue of fact.

Lastly, plaintiff alleges defendant violated the fiduciary duty they owed to him by failing to object to an increase in Village Taxes assessed upon the property at issue. While a "bank, in its capacity as escrow holder of funds to be used for payment of property taxes, may be held liable on theory of breach of fiduciary duty for failure to make required tax payments" defendant has demonstrated no such breach on these papers. (Standard Federal Bank v. Healy, 7 AD3d 610, 612 [2d Dept. 2004]; Davis v. Dime Sav. Bank of New York, FSB, 158 AD2d 50 [3d Dept. 1990]). Defendant does not allege that plaintiff failed to make a tax payment, which he had escrowed with the bank. Rather, defendant claims the breach occurred due to plaintiff's failure to challenge a tax bill. Defendant fails to support the finding of this claimed duty with any documentary evidence. As such, no triable issue of fact is raised.

Accordingly, plaintiff's motion for summary judgement is granted and this Court's prior appointment of a referee to compute is confirmed.

All papers, including this Decision and Order, are being returned to the attorney for the plaintiff. Plaintiff shall comply with CPLR § 2220 for the filing and service of this Decision and

Order. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: December 8, 2008  
Albany, New York

  
JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion for Summary Judgment and to Confirm the Appointment of a Referee to Compute of Gerald Roth, dated August 21, 2008, with attached affirmation of Gerald Roth, dated August 18, 2008, with attached Affidavit of Merit of Kelley Godwin, dated August 19, 2008, and with attached Exhibits A-I.
2. Affidavit in Opposition to Plaintiff's Motion for Summary Judgment and to Confirm the Appointment of a Referee of Ronald Parenti, dated September 8, 2008, with attached

- Exhibits A-C.
3. Reply Affirmation of Gerald Roth, dated September 22, 2008, with attached Exhibits A-D.