Bandler v JP Morgan Chase Bank, N.A.

2009 NY Slip Op 31278(U)

June 8, 2009

Supreme Court, New York County

Docket Number: 604244/2005

Judge: Paul G. Feinman

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SCANNED ON 6/10/2009

[* 1]

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

PRESENT: HON. PAUL G. FEINMAN Justice

PART 12

Index Number : 604244/2005

BANDLER, JUDITH

VS.

JP MORGAN CHASE BANK, N.A.

SEQUENCE NUMBER : # 001

PARTIAL SUMMARY JUDGMENT

INDEX NO. 604244-05

MOTION DATE 5/13/09

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

_____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION AND CROSS MOTION(S) ARE DECIDED IN ACCORDANCE WITH ANNEXED DECISION AND ORDER

FILED
JUN 10 2009
COUNTY CLERK'S OFFICE
NEW YORK

Compliance conference set for 7/8/09 at 11:00 a.m. in Part 12, Room 212, 60 Centre St.

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

Dated: 6/8/09

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☒ CC 7/8/09 11 AM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: IAS PART 12

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JUDITH BANDLER,

Plaintiff,

Index. No. 604244/2005

- against-

JP MORGAN CHASE BANK, N.A.,

Defendant/Third Party Plaintiff,

-against-

Third Party Index No. 590383/2007

BRIAN BANDLER,

Third Party Defendant.

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APPEARANCES:

PLAINTIFF
Richard A. Klass, Esq.
16 Court Street, 29th Fl.
Brooklyn NY 11241
(718) 643-6063

DEFENDANT/THIRD PARTY PLAINTIFF
Pittoni, Bonchonsky & Zaino, LLP
By: Thomas Reardon, Esq.
226 Seventh Street, Suite 200
Garden City NY 1530
(516) 248-5400

THIRD PARTY DEFENDANT
Buonamici & Laraus, LLP
By: Albert Buonamici, Esq.
222 Bloomingdale Road, Suite 301
White Plains NY 10605
(914) 288-9200

FILED
JUN 10 2009
COUNTY CLERK'S OFFICE
NEW YORK

Papers considered on review of this motion by plaintiff for partial summary judgment:

Notice of Motion by Plaintiff	1
Defendant's Aff. in Opp., Memo. of Law	2, 3
Notice of Cross Motion by Third Party Defendant, Aff. in Support	4, 5
Plaintiff's Aff. in Opp. to Cross Motion, Reply Memo of Law	6, 7

PAUL G. FEINMAN, J.

Plaintiff Judith Bandler (Ms. Bandler) moves pursuant to CPLR 3212, for an order granting partial summary judgment against defendant JP Morgan Chase Bank, N.A. (Chase) on her third cause of action, which asserts a violation of the Truth in Lending Act, 15 USC 1601, et

seq. (TILA). Plaintiff seeks to rescind a home equity line of credit (credit line) filed by Chase on her property, and to recoup certain moneys paid to Chase, and to recover attorney's fees. Third party defendant Brian Bandler (Mr. Bandler), cross-moves, pursuant to CPLR 3211 and 3212 for an order granting summary judgment dismissing the complaint and the third party complaint. For the reasons stated below, the motion and the cross motion are denied.

BACKGROUND AND FACTUAL ALLEGATIONS

Third party defendant Brian Bandler was married to plaintiff Judith Bandler at the time these events ensued. The parties are now involved in divorce proceedings pending in another county. Mr. Bandler was, at the time of the loans at issue, and continues to be, employed by defendant/third party plaintiff Chase. It bears noting that both Mr. and Ms. Bandler are practicing attorneys.

In 2002, Ms. Bandler, along with Mr. Bandler, sought to finance their marital property through a mortgage with Chase. On August 27, 2002, Ms. Bandler and Mr. Bandler secured a mortgage in the amount of $315,000.00 (mortgage). Thereafter, on December 2, 2002, Ms. Bandler issued a Power of Attorney (POA), in favor of Mr. Bandler, as her attorney-in-fact. According to Ms. Bandler, the POA was to be used solely in connection with the closing of the mortgage for purchasing the property. (Plaintiff Affidavit, at 11.) In pertinent part, the POA states as follows:

> This power of attorney is limited to actions and agreements relating to real property in the City of New Rochelle, Westchester County, New York, commonly known as 14 Dorchester Road, Scarsdale, New York, including without limitation acquisition, closing and settlement, and execution of promissory notes, mortgages and other instruments of every description in connection with financing for such acquisition, specifically, the right to sign the $315,000 mortgage and related documents with JPMorgan Chase Bank, under loan #1135056447.

Plaintiff Exhibit H.

According to Ms. Bandler, on December 3, 2002, the day of the closing, Mr. Bandler secured a Chase Home Equity Line of Credit (credit line), in the amount of $315,000.00, as an additional mortgage on the property. Using the POA, Mr. Bandler also closed on the original mortgage transaction.[1] Ms. Bandler maintains that she only found out about the credit line at least a year later, after she spoke to a Chase employee regarding her mortgage. Plaintiff claims that she did not grant Mr. Bandler the authority to enter into this credit line, as her POA only authorized her husband to handle the original mortgage transaction.

After Mr. Bandler secured this credit line, Chase allowed him to withdraw two checks in the amount of $100,000.00 and $200,000.00. Ms. Bandler alleges that she was not given any notice about these checks. She categorizes Mr. Bandler's activity after receiving these checks as a "complicated series of transactions that involved regular deposits into a variety of accounts, including joint credit card, checking and brokerage accounts ... ." (Plaintiff Affidavit, at ¶28.) Plaintiff submits no documentation to support these allegations.

Ms. Bandler made a payment of $50,000.00 towards the credit line in February 2004. She states that this payment was made as a direct "result of the coercion of Chase and in reliance of its false and misleading statements that she had executed documentation making her legally responsible for extensions of credit... ." (*Id.*, at ¶38.) However, plaintiff has not provided any evidence other than her bare allegation to reinforce her alleged claims of coercion.

Plaintiff commenced this action in February of 2007, asserting six causes of action.

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[1]The mortgage loan paid at closing was $300,000.00, not $315,000.00, as indicated in the original mortgage commitment letter. (Plaintiff Exhibit I.)

Chase filed an answer and commenced a third party action against Mr. Bandler. In her third cause of action, Ms. Bandler maintains that Chase was obligated to comply with certain reporting and disclosure terms with regard to the credit line under TILA, including "[a]ll interest rates charges and the calculation thereof, all fees associated with the credit line and her right to rescind the credit line, all in the time and manner required under various banking laws." (*Id.*, at ¶44.) As a result of Chase's purported noncompliance, Ms. Bandler alleges she has the right to rescind the credit line and she is also entitled to recoup the $50,000.00 payment.

In response to the current motion, Chase states that there is no question as to the validity of the POA, and that Mr. Bandler had the authority to enter into any type of mortgage agreement. It further argues that the POA allowed Mr. Bandler to execute all "other instruments of every description," including executing the right to rescission notice. Chase also states that the checks payable to Mr. Bandler from the credit line were deposited into a joint account maintained by both Ms. and Mr. Bandler. (Defendant Affidavit, at ¶10.) It also argues that the $200,000.00 check from the credit line corresponded to a $200,000.00 principal payment made on the primary mortgage. (*Id.*, at ¶8; Brian Bandler Exhibit D.) Chase also indicates that Mr. Bandler was given the documentation regarding the credit line, including the right to rescission notice. (Defendant Ex. A.) Furthermore, Chase maintains that Ms. Bandler's claim that she was unaware of the credit line, is dubious on its face. Chase provides documentation that plaintiff executed a loan application in connection with the subject credit line. (Defendant Ex. B.) This paperwork documents that plaintiff herself signed an application for a home equity credit line, in the amount of $315,000.00, on August 15, 2002.

In his cross motion, Mr. Bandler contends that Ms. Bandler was aware of the credit line

and authorized him to act on her behalf. As previously noted, both Bandlers are attorneys, and according to Mr. Bandler it was Ms. Bandler who drafted the POA. He argues that as the drafter Ms. Bandler could have easily prohibited him from signing the credit line application on the day of the closing, but did not do so. Mr. Bandler maintains that the couple decided together to take out a credit line so that they could have a "convenient and fast way to obtain funds when needed," and that plaintiff did not object to the credit line or the use of the funds until after December 2004, which was the start of their divorce proceedings. (Brian Bandler Affidavit, at 6.) He also submits documentation and acknowledges that the $100,000.00 check taken from the credit line was deposited into a joint marital account and was used to pay joint marital expenses. (Bandler Exhibit H.) Mr. Bandler claims Ms. Bandler knew about this transaction, which provided the parties with among other things, new furniture. He avers that the $50,000.00 payment made by plaintiff to Chase came primarily from a withdrawal from his 401K account.

DISCUSSION

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York University Medical Canter*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima face case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material issues of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). In considering a summary judgment motion, evidence should be viewed in the "light most favorable to the opponent of the motion."

Grasso at 544, citing to *Marine Midland Bank, N.A., v Dino and Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). The function of the court is one of issue finding, not issue determination. *Ferrante v American Lung Assn.*, 90 NY2d 623, 630 (1997).

TILA (15 USC 1601, et seq) was enacted to protect consumers against the "inequities in their negotiating position with respect to credit and loan institutions." *Community Mutual Savings Bank v Gillen*, 171 Misc 2d 535, 537 (Mount Vernon City Ct 1997). Under TILA, lenders are required to give standard information to the borrowers, such as borrower's rates, finance charges, and annual percentage rates, so that they can make informed decisions. *See eg Stein v JP Morgan Chase Bank*, 279 F Supp 2d 286, 291 (SD NY 2003); *General Elec Capital Financial v Bank Leumi Trust Co of NY*, 1999 WL 33029 at *24 (SD NY 1999). As Ms. Bandler argues that she was not informed of the credit line, she seeks to rescind it, pursuant to 15 USCS Section 1635 (a).[2]

Setting the validity of the POA aside, the narrow issue presented is limited to whether Ms. Bandler can meet her burden of proof that she has no obligation with respect to the credit line. Although the extant record contains compelling evidence that Ms. Bandler did in fact know about the line of credit, she alleges that defendant never "[a]ttempted to deliver to plaintiff the disclosure information and rescission forms under TILA ... ." (Plaintiff Memorandum of Law, at 10.) However, Ms. Bandler conveniently fails to attach additional documentation provided by Chase which reveals that she indeed, did sign a loan application with regard to the credit line.

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[2]TILA provides that in order to rescind a loan, a consumer may exercise the right to rescind until midnight of the third business day following the latest of: (1) consummation of the transaction; (2) delivery of a proper notice of the right to rescind; or (3) delivery of all the material disclosures correctly made.

(Brian Bandler Ex. A.) The document has a "EasyClose Line of Credit" box clearly checked. The application states, "I understand that this application is an addendum to my application for a residential first mortgage loan through either Chase Manhattan Mortgage Corporation, JP Morgan Chase or another first mortgage lender. All the statements I have made in this application and my first mortgage application are true and correct." (Defendant Ex. B.) Only in her reply memorandum of law does plaintiff acknowledge signing the application for the credit line, but then alleges that defendant's applications for credit lines and mortgages are confusing and do not contain the disclosures required by TILA. Ms. Bandler insinuates that Chase engaged in deceptive loan practices by issuing checks in large amounts to one of its employees, i.e. Mr. Bandler. However, Chase claims that it was acting on a valid POA, which entitled Mr. Bandler to access to the credit line. Ms. Bandler fails to attach copies of statements, which were produced by defendants, which demonstrate that $100,000.00 was deposited into the ***joint*** marital account and that $200,000.00 was utilized to pay down the couple's mortgage. In short, plaintiff has failed to prove entitlement to judgment of dismissal as a matter of law, specifically failing to prove that she was unaware of the credit line. Accordingly, plaintiff Ms. Bandler 's motion for partial summary judgment on the third cause of action is denied.

As the plaintiff herself suggests, TILA is aimed at deceptive practices by lenders, and not the subjective beliefs or actions of borrowers. Although it seems possible that plaintiff had full disclosure of the credit line, in its reply papers, neither Chase nor Mr. Bandler address Ms. Bandler's complaint that Chase did not comply with then-applicable TILA procedures. Mr. Bandler simply states that the language of the POA clearly allows for the execution of the loan documents, and as such, Chase acted properly in the matter. However, Chase does not present

any records, documents or testimony which establish that it complied with its requirements under TILA. Thus, there is a question of fact as to whether Chase complied with the TILA provisions as alleged in plaintiff's complaint, and Mr. Bandler's liability, if any, depends on Chase's liability. Accordingly, third party defendant Mr. Bandler's cross-motion for summary judgment is denied.

It is therefore

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that third party defendant's cross-motion for summary judgment is denied.

Dated: June 8, 2009

Paul G. Feinman
J.S.C.

HON. PAUL G. FEINMAN

FILED
JUN 10 2009
COUNTY CLERK'S OFFICE
NEW YORK