

**DLJ Mtge. Capital, Inc. v Reeps**

2009 NY Slip Op 32272(U)

September 14, 2009

Supreme Court, New York County

Docket Number: 602921/2006

Judge: Richard B. Lowe

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

PRESENT: HON. RICHARD B. LOWE, II,  
*Justice*

PART 56

DLJ Mortgage Capital

INDEX NO. 602 921/06  
MOTION DATE 4/7/09  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

- v -

Reeps, Guy

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

**FILED**  
SEP 16 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION**

Dated: 9/14/09

HON. RICHARD B. LOWE, III  
*J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 56

-----X  
DLJ MORTGAGE CAPITAL, INC.,

*Plaintiff,*

Index No. 602921/2006

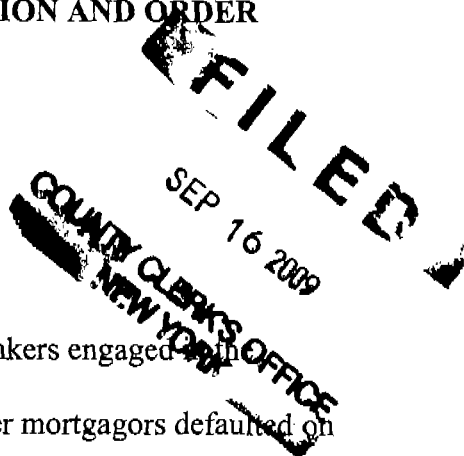
- against-

GUY REEPS, CROSS ISLAND CAPITAL CORP.,  
and MCS MORTGAGE BANKERS, INC., d/b/a  
CIC,

*Defendants.*

-----X  
RICHARD B. LOWE III, J.S.C:

DECISION AND ORDER



This matter concerns the allocation of risk of loss among bankers engaged in the purchase and sale of mortgages, and specifically losses incurred after mortgagors defaulted on repayment obligations.

Defendant MCS Mortgage Bankers, Inc., d/b/a CIC ("MCS") move for summary judgment seeking to dismiss plaintiff DLJ Mortgage Capital, Inc.'s ("DLJ") claims asserted against it. Defendants Guy Reeps ("Reeps") and Cross Island Capital Corp. ("Cross Island") cross-move to dismiss, pursuant to CPLR § 3211(a)(7), or, in the alternative, for summary judgment pursuant to CPLR § 3212 dismissing the verified complaint in its entirety. DLJ also cross-moves for summary judgment, pursuant to CPLR § 3212, against both Cross Island and Reeps, on the first, eighth, ninth, tenth, eleventh, and twelfth causes of action in the verified complaint.

By stipulation dated December 31, 2008, MCS withdrew its summary judgment motion, and DLJ has dismissed the action, with prejudice, as against MCS. Therefore, the remainder of this opinion does not include the allegations asserted against MCS.

## BACKGROUND

In 2002, Cross Island was a mortgage banker licensed by the State of New York. Reeps was the president of Cross Island, and its controlling shareholder.

This action arises from an agreement dated December 1, 2002, entitled "Seller's Purchase, Warranties and Interim Servicing Agreement, between Cross Island, as seller and servicer of mortgages, and DLJ, as purchaser (Jan 13, 2009 Affidavit of Margaret Della Ferra ["Della Ferra Aff"] Ex 1, the "Servicing Agreement"). Pursuant to the terms of the Servicing Agreement, Cross Island originated mortgages and then sold them to DLJ.

Section 3.05 of the Servicing Agreement requires Cross Island to repurchase any mortgage sold to DLJ if the mortgagor is 30 days or more delinquent "with respect to any of the first three (3) monthly payments."

DLJ alleges in its verified complaint that Cross Island breached its duty under the Servicing Agreement to repurchase eight mortgages, issued to six mortgagors, that allegedly had early payment defaults. DLJ states in its moving affidavit that it has recovered all losses related to three of the mortgagors named in the verified complaint. Therefore, those mortgages are no longer a part of this action. The remainder of this action concerns mortgages issued to three separate mortgagors: Diaz, Urbano, and Adams.

Cross Island's liability for failure to repurchase under the Servicing Agreement is undisputed as Reeps admitted at his deposition that Cross Island should have repurchased the mortgages that are the subject of this action (Della Ferra Aff Ex 4 at 82:25 – 83:5, 83:6-12, 81:22-25, 82:24).

*The Diaz Mortgages*

DLJ alleges that, on or about April 16, 2004, Cross Island issued two mortgages to Pablo Diaz, a senior and a junior mortgage, in the amounts of \$448,000, and \$84,000, and that Cross Island sold the mortgages to DLJ. Diaz defaulted in a manner that triggered the early payment default provision. DLJ duly demanded that Cross Island repurchase the Diaz mortgages. Reeps admits that he received the repurchase notice, and failed to repurchase the Diaz mortgages.

In 2005, DLJ foreclosed on the Diaz property, and the property was auctioned on May 19, 2006. At the time of the auction, DLJ alleges that it was owed \$534,900.27 in principal and interest, including foreclosure costs. At the auction, DLJ made a "credit bid" of \$524,525.35, in order to take title to the Diaz property.

DLJ submits detailed documentary evidence demonstrating that, on February 15, 2007, DLJ sold the Diaz property to OR Homes, Inc., for \$187,900, realizing, after fees and expenses, \$160,306.51. DLJ alleges that its net loss with respect to both Diaz mortgages was \$411,511.62. Neither Reeps nor Cross Island submit any documentary evidence that raises a legally sufficient challenge to the evidence presented by DLJ.

#### *The Urbano Mortgages*

DLJ alleges that on July 14, 2004, Cross Island issued a senior and a junior mortgage to Nadine Urbano in the amounts, respectively, of \$296,000, and \$74,000, and that Cross Island sold the mortgages to DLJ. Urbano defaulted in a manner that triggered the early payment default provision. DLJ duly demanded that Cross Island repurchase the Urbano mortgages. Reeps admits that he received the repurchase notice, and failed to repurchase the Urbano mortgages.

DLJ submits detailed documentary evidence demonstrating that, in 2005, DLJ foreclosed

on the Urbano property, and the property was sold on November 28, 2005, for \$390,000. DLJ states that it was paid in full for the senior Urbano mortgage, and that there was a \$25,785.52 surplus above the amount of the senior mortgage, but DLJ has not received it. DLJ alleges that it is owed \$73,981.06 in principal and accrued interest on the junior mortgage as of September 2004. Neither Reeps nor Cross Island submit any evidence challenging DLJ's prima facie showing with respect to the junior Urbano mortgage.

#### *The Adams Second Mortgage*

DLJ alleges that on December 16, 2003, Cross Island issued two mortgages to Valrye Adams, but only the junior mortgage, which was for \$120,000 is subject to this action. Cross Island sold the junior mortgage to DLJ, and Adams defaulted in a manner that triggered section 305 of the Servicing Agreement. After due notice by DLJ, Cross Island admittedly failed to repurchase the junior Adams mortgage.

DLJ submits detailed documentary evidence demonstrating that the property became the subject of a "short sale" in June 2005, which resulted in a net loss to DLJ of \$84,949.86. Neither Reeps nor Cross Island submit any evidence disputing the calculation of DLJ's damages under the Adams mortgage, but merely argue that the mortgage was satisfied by the short sale.

#### *Reeps and Cross Island*

Reeps states in his affidavit that Cross Island is no longer in business, having surrendered its banker's license, effective February 25, 2005. Reeps alleges that he voluntarily surrendered his license after DLJ demanded payments from Cross Island, based on Cross Island's failure to repurchase mortgages that would have reduced Cross Island's net capital position below the required \$250,000. Around that same period of time, in January and February 2005, Reeps

withdrew approximately \$450,000 from Cross Island's checking account and deposited into his personal checking account. Reeps alleges that he withdrew the money on advice of counsel, and that he subsequently put the money back in into Cross Island's accounts.

On August 18, 2006, DLJ filed its complaint asserting twelve causes of action. The first cause of action is against Cross Island and Reeps and seeks \$1,761,542.17 in damages, plus interest, with respect to the mortgages based on Cross Island's breach of its duty to repurchase. Under the first cause of action, DLJ also seeks liability against Reeps based on the theory of alter ego liability. As limited by DLJ's moving affidavit, the first cause of action seeks damages only with respect to Adams, Diaz and Urbano mortgages, in the aggregate amount of \$609,539.14, plus interest. Reeps alleges that these are all so-called "no documents" mortgages.

The second through seventh causes of action are withdrawn, either because they relate to MCS or to mortgages for which DLJ has withdrawn its claims.

The eighth cause of action alleges that, beginning in 2003, Cross Island, as part of its liquidation plan, made fraudulent conveyances of its assets to Reeps, including equipment, accounts receivable, promissory notes of which Cross Island was the payee, and mortgages on which Cross Island was the mortgagee. It alleges that these transfers to Reeps were made without consideration, while Cross Island was insolvent, and while Cross Island was a party to the Servicing Agreement, all in violation of New York Debtor and Creditor Law § 273.

The ninth cause of action alleges that, beginning in 2003, Cross Island made conveyances to Reeps, which were done to leave Cross Island without sufficient capital to meet its obligations under the Servicing Agreement, and to "use the corporate shield to avoid liability under the agreement." It further alleges that Cross Island refused to repurchase specified mortgages from

DLJ in 2004 and 2005 as required under the Servicing Agreement, in violation of Debtor and Creditor Law § 274.

The tenth cause of action alleges that, beginning in 2003, Cross Island liquidated its assets and conveyed all or part of its assets to Reeps, without fair consideration, while it still had obligations to DLJ, intending that Cross Island would be unable to meet those obligations when they matured, in violation of Debtor and Creditor Law § 275.

The eleventh and twelfth causes of action are pleaded on the same facts under Debtor and Creditor Law § 276. The eleventh cause of action alleges that the transfers were made with actual intent to defraud DLJ, and were part of an intentional plan by Cross Island to render it unable to pay its debts to DLJ. The twelfth cause of action seeks attorneys' fees pursuant to Debtor and Creditor Law § 276.

## DISCUSSION

### *Breach of Duty to Repurchase*

As discussed above, Cross Island has already conceded liability as to failing to repurchase the defaulted mortgages pursuant to the Servicing Agreement. In support of its claims for damages, DLJ submits the affidavit of Margaret Della Ferra (Ferra), the Director of Mortgage Trading Finance at DLJ. Ferra submits the detailed allegations concerning the Diaz, Urbano, and Adams mortgages. DLJ also submits affidavits by Magdalena Matthes, Michelle Simon, and Brandt Himler, each of whom works for third parties retained by DLJ to service the mortgages. Those affidavits contain exhibits that make a prima facie showing of the amounts claimed by DLJ on the mortgages at issue.

Specifically, DLJ has made a prima facie showing that it suffered damages of

\$484,151.64 on the Diaz mortgages when it subsequently sold the property. DLJ has made its prima facie showing for liability as to the Urbano mortgages, and that there is an amount due. However, DLJ alleges that it is owed \$73,981.06 under the Urbano mortgages, but it is not clear whether DLJ has adequately accounted for the \$25,785.52 surplus in the sale of the senior Urbano mortgage. A further submission is necessary to determine the status and treatment of any lien that the junior Urbano mortgage has on that surplus. Concerning the Adams mortgage, DLJ has made its prima facie showing that it suffered damages of \$84,949.86.

As DLJ has established its prima facie entitlement to judgment as a matter of law against Cross Island on its first cause of action, the burden shifts to Cross Island to demonstrate the existence of a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]).

In opposition to DLJ's prima facie showing on the first cause of action, and in support of Reeps's and Cross Island's cross motion to dismiss, Cross Island submits the affidavit of Reeps, in which he argues that DLJ did not suffer any damages with respect to the mortgages in issue. There is no merit to Reeps's contentions.

Specifically, Reeps and Cross Island argue that DLJ suffered no damages with respect to the two Diaz mortgages because it "bid in" \$524,525.35 against other bidders at the auction. The fact that DLJ "bid in" at the auction means only that DLJ was protecting its interest by exchanging its mortgage for title to the property upon which it held a lien. DLJ states, without opposition, that DLJ received no money from any third party as a result of its credit bid. As to liability under the repurchase provision, Cross Island has not raised an issue of fact or a *bona fide* defense.

As to damages under the first cause of action, Reeps argues that there is no provision in the Servicing Agreement that entitles DLJ to interest on the defaulted mortgages at the rate set in those mortgages. In its calculation of damages, DLJ has included an award with respect to each of the three mortgagors for interest, but it is not clear from DLJ's submissions whether it is applying the statutory rate or the rate set in the mortgage agreement with respect to all three mortgagors. A more detailed submission will be necessary for DLJ to establish the amount of its damages with respect to each mortgagor.

Thus DLJ has demonstrated its entitlement to summary judgment, as to liability only, on its first cause of action against Cross Island and Cross Island has failed to demonstrate the existence of a factual issue or *bona fide* defense as to its liability for failure to repurchase the mortgages. However, DLJ has not demonstrated its entitlement to damages as a matter of law in the amounts sought because Cross Island raises meritorious challenges to the amount of damages DLJ has claimed with respect to the rate of interest, and the surplus value in the Urbano property.

Concerning DLJ's attempt to hold Reeps liable for breach of the repurchase provision, DLJ alleges that Reeps is liable on an alter ego, veil-piercing theory for the damages resulting from the failure of Cross Island to repurchase the mortgages. Reeps argues that DLJ has not sufficiently pled or substantiated by sufficient evidence any basis for personal liability against him, individually. Reeps also argues that he withdrew the money on advice of counsel in connection with an unrelated internal problem, and subsequently returned the money to Cross Island.

DLJ has not submitted sufficient evidence to establish its entitlement to judgment as a

matter of law against Reeps under an alter ego theory of liability. The statement attributed to Reeps that DLJ was “taking the food off of his table and out of his childrens’ mouth” (Dec 2, 2008 Affirmation of Daniele D. De Voe [“De Voe Aff”] Ex G 169:10-15) falls far short of the required showing to establish liability as a matter of law on an alter ego theory.

To pierce the corporate veil on an alter ego theory, a plaintiff must show either that the owner exercised complete domination of the corporation regarding the challenged transaction, and that the domination was used to commit a fraud or wrong against the plaintiff resulting in injury to plaintiff (*see Old Republic Natl. Title Ins. Co. v Moskowitz*, 297 AD2d 724, 725 [2d Dept 2002]) or that there has been “a failure to adhere to corporate formalities, inadequate capitalization, use of corporate funds for personal purpose, overlap in ownership and directorship, or common use of office space and equipment” (*Forum Ins. Co. v Texarkoma Transp. Co.*, 229 AD2d 341, 342 [1st Dept 1996]). “In any event, this fact-laden claim to pierce the corporate veil is particularly unsuited for resolution on summary judgment” (*id.*). Plaintiff has failed to satisfy these requirements as a matter of law, and summary judgment is inappropriate at this time.

#### *The Alleged Fraudulent Transfers*

At his deposition, Reeps acknowledged that he made withdrawals by check from Cross Island’s checking account between January 26, 2005 and February 9, 2005, totaling \$449,901, which were deposited into Reeps’s personal checking account. He testified that he withdrew the money on advice of counsel, and that he subsequently put the money back in, but was unable to recall how much he redeposited or when such deposits were made.

DLJ has established that Cross Island was indebted to DLJ at the time of the withdrawal

by Reeps of \$449,901 from Cross Island's bank account, leaving Cross Island unable to pay its debt to DLJ. DLJ has submitted sufficient evidence, including admissions by Reeps, to demonstrate its entitlement to judgment as a matter of law that the transfers to Reeps violate New York Debtor and Creditor Law § 273, which is captioned, "[c]onveyances by insolvent," and provides as follows:

[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

New York Debtor and Creditor Law § 272 defines "fair consideration" as follows:

[a] Fair consideration is given for property, or obligation (1) when in exchange for such property, or obligation, as a fair equivalent therefore, and in good faith, property is conveyed or an antecedent debt is satisfied, or (2) when such property, or obligation is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property, or obligation obtained.

DLJ made its *prima facie* case that Reeps violated Debtor and Creditor Law § 273 by demonstrating that the amounts Reeps transferred to his personal account from Cross Island left Cross Island with insufficient funds to meet its obligations to repurchase the mortgages with early payment defaults. Reeps has failed to demonstrate that there was fair consideration for the transfers.

By the same evidence, DLJ established its entitlement to judgment as a matter of law on its ninth cause of action pursuant to Debtor and Creditor Law § 274, which is captioned, "[c]onveyances by persons in business," and provides as follows:

[e]very conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the

continuance of such business or transaction without regard to his actual intent.

In reply to DLJ's *prima facie* showing on its fraudulent transfer causes of action, Reeps submits an affirmation of counsel, annexing numerous exhibits, including Cross Island's bank statements for 2005 through 2007. Those statements show that, out of the \$449,901 that Reeps transferred from Cross Island to his personal account, he repaid \$257,300 in the course of 2005. Reeps asserts that he also deposited an additional \$115,500 in a series of deposits to Cross Island's account, but is unable to provide documentation of the source of those funds.

Reeps has failed to demonstrate the existence of a triable issue of fact concerning Cross Island's liability as to the eighth and ninth causes of action. The evidence shows that Reeps withdrew the \$449,901 from Cross Island within weeks before the effective date of the surrender of Cross Island's mortgage banker's license. The alleged fact that Reeps redeposited most of the money withdrawn over a period of months, in a series of deposits, does not negate the *prima facie* showing by DLJ that Reeps made deposits to his personal account of Cross Island's funds, without consideration, leaving Cross Island unable to pay its debts to DLJ. There is no merit to Reeps's argument that he had a right to withdraw the funds because they represented paid-in capital or retained earnings.

Therefore, DLJ has demonstrated its entitlement to judgment as a matter of law on the eighth and ninth causes of action, based on fraudulent conveyances by Cross Island to Reeps.

DLJ has not demonstrated its entitlement to judgment as a matter of law on its tenth cause of action, which alleges that, beginning in 2003, Cross Island liquidated its assets and conveyed all or part of its assets to Reeps, without fair consideration, while it still had obligations to DLJ, intending that Cross Island would be unable to meet those obligations when

they matured. The tenth cause of action alleges violation of Debtor and Creditor Law § 275, which is captioned, “[c]onveyances by a person about to incur debts,” and provides as follows:

Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

DLJ has not established Reeps’s intent of belief as a matter of law. By the same reasoning, DLJ has not established its entitlement to judgment as a matter of law with respect to the eleventh cause of action alleging violation of Debtor and Creditor Law § 276, captioned, “[c]onveyance made with intent to defraud,” which provides as follows:

[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

As tenth and eleventh causes of action are based on sections of the Debtor and Creditor Law which require a showing of belief or actual intent, and DLJ has not established Reeps’s actual intent to defraud as a matter of law, judgment on those causes of action are inappropriate at this juncture. The part of the eleventh and twelfth causes of action that seeks attorneys’ fees must also await final resolution of this action.

The issue of the amount of DLJ’s damages as a result of the fraudulent transfers cannot be determined on this motion. That issue requires a more complete examination of Cross Island’s assets and liabilities at the time of the transfer, as well as further proof of what funds Reeps returned to Cross Island, and whether the funds returned by Reeps were utilized to pay creditors other than DLJ.

**CONCLUSION**

Accordingly, it is hereby

ORDERED that defendants' cross motion to dismiss the verified complaint for failure to state a cause of action (CPLR 3211[a][7]), or for summary judgment, is denied; and it is


ORDERED that plaintiff's cross motion for summary judgment is granted to the extent of awarding it judgment, as to liability only, on its first cause of action, against Cross Island only, and summary judgment as to liability only on its eighth and ninth causes of action, and is otherwise denied; and it is

ORDERED that this matter be referred to a Special Referee to hear and determine damages in accordance with this decision; and it is further

ORDERED that a copy of this order with notice of entry shall be served on Room 119 to arrange for the reference to a Special Referee.

Dated: September 14, 2009

ENTER:

  
HON. RICHARD B. LOWE, III  
J.S.C.

**FILED**  
SEP 16 2009  
COUNTY CLERK'S OFFICE  
NEW YORK