

Olivo v Residential Capital Corp.

2009 NY Slip Op 32678(U)

October 28, 2009

Supreme Court, Nassau County

Docket Number: 004625/2006

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

E

P R E S E N T :

HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 9

KENNETH OLIVO and KATHY OLIVO,
individually and on behalf of all others similarly
situated,

Plaintiffs,

INDEX NO.: 004625/2006
MOTION DATE: 09/03/2009
MOTION SEQUENCE: 001

- against -

RESIDENTIAL CAPITAL CORPORATION, d/b/a
HOMECOMINGS FINANCIAL,

Defendant.

The following papers read on this motion:

Amended Notice of Motion, Affirmation, Settlement Agreement & Exhibits Annexed	1
Plaintiffs' Memorandum of Law in Support of Preliminary Approval of Settlement and Scheduling fo Fairness Hearing	2
Affidavit of Andrew B. Messite & Exhibit Annexed	3

PRELIMINARY STATEMENT

Plaintiff moves for an order determining that this action may be maintained, for settlement purposes only, as a class action with a Settlement Class as defined in the Settlement Agreement, finding preliminarily that the plaintiffs are class representatives who fairly and adequately represent the interests of the Settlement Class, finding preliminarily that these Settlement Agreement is fair, reasonable and adequate to the Settlement Class, determining that the individual notice and publication notice as attached to the affirmation of Leland L. Greene are

the only notices necessary to satisfy the requirements of due process and Civil Practice Law and Rules Article 9, and scheduling a date for a final approval hearing and the filing of any objections or exclusion requests.

Counsel for defendant, in his affidavit of August 31, 2009 is not object to the relief sought by the plaintiff's and the knowledge is the existence of the settlement agreement between the parties. He notes, however, that Homecomings Financial Network, Inc. is a distinct corporate entity, and requests that the caption be amended to name of Homecomings Financial Network, Inc. as the defendant, since Residential Capital did not do business as Homecomings Financial and it is the latter organization which sent the mortgage payoff figures, for which it charged a "fax fee", which is the basis of the action.

BACKGROUND

This action on behalf of the Olivo's and others similarly situated involves a claim that the defendant, and in violation of Real Property Law section 274-a, charged a fee for providing a first payoff letter on the existing mortgages. Real Property Law section 274-a, provides in pertinent part, as follows:

§ 274-a. Certificate of principal amount unpaid on mortgages of real property

1. The holder of a mortgage upon real property shall execute and deliver to the owner of the real property upon which such mortgage is a lien a written instrument setting forth the amount of the principal of said mortgage remaining unpaid, the date to which interest has been paid, and the amounts, if any, claimed to be unpaid upon said mortgage for principal and interest, itemizing the same, provided, however, that prior written demand by registered or certified mail has been made upon the holder of such mortgage by such owner of the real property and that such owner of the real property shall have executed and delivered to another a written contract to convey, or shall have received a written commitment to make a mortgage loan upon, the real property or an interest therein. The written instrument hereinbefore required of the holder of the mortgage shall be a certificate duly executed and acknowledged in the same manner as required by law to entitle a conveyance of real property to be recorded, except that a bank, savings bank, private banker, trust company, savings and loan association or any other banking organization, as defined in the banking law, a national bank or trust company or any other federally-chartered or federally-regulated savings and loan association or other banking institution

and an insurance company duly organized or licensed to do business in this state under the insurance law of this state and the state of New York, or an agency thereof and a political subdivision of the state of New York or an agency thereof may, in lieu of the said certificate, furnish a letter signed by a duly authorized officer, or employee or agent, containing the information required to be set forth in such certificate. An owner of real property who shall have complied with the foregoing requirements and who shall not have received the written instrument from the holder of the mortgage thereon within twenty days after such compliance shall be entitled to petition a court of competent jurisdiction for an order requiring such holder of the mortgage to comply with this section.

2. (a) The mortgagee of an owner-occupied, one-to-six family residential structure or residential condominium unit, shall deliver within thirty days, any mortgage related documents to an authorized individual making a bona fide written demand for such documents. The mortgagee shall not charge for providing the mortgage-related documents, provided, however, the mortgagee may charge not more than twenty dollars, or such amount as may be fixed by the banking board, for each subsequent payoff statement provided under this subdivision. If the mortgagee fails to deliver the mortgage-related documents, the mortgagee shall be liable for the actual damages to the mortgagor by reason of such failure. In computing actual damages the court may consider the actual rate of interest on the mortgage debt and current prevailing rate or rates of interest on comparable debts. However, actual damages do not include pain and suffering, mental or emotional distress or the like. The replacement costs of a lost abstract of title required to be delivered hereunder, may be deducted from the amount required to satisfy the mortgage.

...

It is clear from the foregoing that lending institutions are not permitted to charge a fee a first-time request for payoff figures on the mortgage on one—six family residences and condominium units. Despite this prohibition, the basis of the claim is that Defendant charged a \$20 “fax fee” to provide the information which they were obligated to do for free.

THE AGREEMENT

The Stipulation of Settlement and Settlement Agreement is annexed as Exh. “A” to the

Motion. The Agreement provides, and the affidavit of counsel for Defendants acknowledges, that it is in the best interest of all parties that the matter be resolved in accordance with the terms of the Agreement. The "Class" is defined as all owner-occupiers of Qualified Realty who paid a fee for a first request for a mortgage payoff statement in connection with the payoff of the mortgage loans secured by Qualified Realty. Qualified Realty is defined as one-six family residential dwellings or condominium units within the State of New York.

The Agreement provides for a Settlement Fund of \$195,000, which counsel believe is adequate to reimburse the approximately 9,750 members of the class, pay administrative expenses and counsel fees. Counsel will seek a fee of \$65,000, representing one-third of the total Settlement Fund.

DISCUSSION

Article 9 of the Civil Practice Law and Rules provides a mechanism for the prosecution of a Class Action which is very similar to the requirements for a Federal class action. The authority for such a proceeding is set forth in Civil Practice Law and Rules §901:

§ 901. Prerequisites to a class action

- a. One or more members of a class may sue or be sued as representative parties on behalf of all if:
1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
 2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
 3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
 4. the representative parties will fairly and adequately protect the interests of the class; and
 5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.
- b. Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

Based upon a review of the Motion with attached exhibits, the Settlement Agreement, and the Affidavit in Support of Plaintiff's application by counsel for Defendant, the Court determines

that the foregoing prerequisites for proceeding as a Class have been met. The members of the Class are not so many as to make resolution impracticable, a single common question of law and fact applies to all members, the representative parties will adequately represent the members of the Class, and a class action is the most efficient method of resolving the controversy. There are no statutory requirements which mandate a minimum recovery for each member of the class, and, in fact, it appears that each member should be essentially reimbursed in full.

The motion by Plaintiffs is in all respects granted, and the caption is modified to reflect the existence of Homecomings Financial Network, Inc. as an independent corporate entity. The caption will henceforth read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

KENNETH OLIVO and KATHY OLIVO,
individually and on behalf of all others similarly situated,

Plaintiffs,

- against -

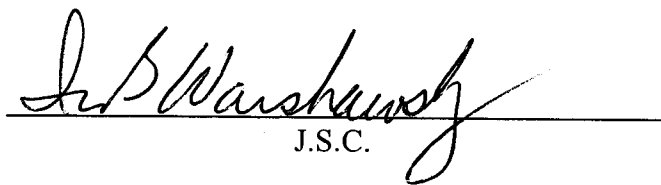
HOMEcomings FINANCIAL NETWORK, INC.,

Defendant.

Plaintiff has submitted an "Order Preliminarily Approving Settlement, Conditionally Certifying Class for Settlement Purposes, and Setting Class Notice, Settlement Hearing and Administration", which the Court is executing contemporaneously herewith.

This constitutes the Decision and Order of the Court.

Dated: October 28, 2009


J.S.C.

ENTERED
NOV 06 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE