

**Eastern Savs. Bank, FSB v Bello**

2009 NY Slip Op 33200(U)

December 23, 2009

Supreme Court, Richmond County

Docket Number: 130669/09

Judge: Anthony Giacobbe

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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF RICHMOND

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TRIAL PART 9

EASTERN SAVINGS BANK, FSB,  
 Plaintiff(s),

HON. ANTHONY I. GIACOBBE

-against-

DECISION

Index No. 130669/09

JUDITH C. BELLO, THOMAS BELLO, UNITED STATES INTERNAL REVENUE SERVICE, NEW YORK STATE DEPARTMENT OF TAXATION, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK STATE WORKER'S COMPENSATION BOARD, and "JOHN DOE #1, through JOHN DOE #12", the last twelve names being fictitious and unknown to Plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest upon the premises described in the Complaint,

Motion No. 001

Defendant(s).

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The following papers numbered 1 to 3 were fully submitted on the 30<sup>th</sup> day of October, 2009:

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| Amended Notice of Motion of Plaintiff<br>with supporting papers (dated August 4, 2009)                   | 1 |
| Affidavit of Defendant JUDITH C. BELLO and<br>Memorandum of Law in Opposition (dated September 11, 2009) | 2 |
| Reply Affirmation of Plaintiff with supporting papers<br>(dated September 16, 2009)                      | 3 |

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Upon the foregoing papers, plaintiff's motion for an order: (1) granting summary judgment; (2) striking the answer and affirmative defenses of defendants in opposition; (3) appointing a referee to compute the amount due and owing to plaintiff; and (4) amending the caption to delete references to "JOHN DOE #1 through JOHN DOE #12," is granted.

Plaintiff commenced this foreclosure action against defendants JUDITH C. BELLO and THOMAS BELLO after JUDITH C. BELLO (hereinafter "defendant") failed to make the

payments due on a mortgage executed by her on October 1, 2007 in the amount of \$550,000 associated with the refinancing of her home. It is alleged, in pertinent part, that defendant failed to make the scheduled payments due for the months of October, November and December, 2008 and for any of the months thereafter. According to plaintiff, on December 31, 2008, a Notice of Intention to Foreclose was sent to defendant advising her of her default in the amount of \$18,911.37, and allowing her to cure her default by February 4, 2009. Defendant was further advised that if she failed to do so, then after such date the entire unpaid balance under the mortgage and note would be accelerated and become immediately due and owing, and foreclosure proceedings would be pursued. Upon defendant's allegedly having failed to cure the default within the specified period, this foreclosure action was commenced.

In her answer, defendant alleges that plaintiff violated General Business Law §349 by engaging in a deceptive and predatory scheme to defraud. According to defendant, plaintiff exaggerated defendant's income for the purpose of generating the subject loan, knowing that she did not have the ability to repay the loan, as part of a "common law scheme to defraud." Defendant also alleges that plaintiff falsely represented that the loan could be freely prepaid, when, in fact, an onerous prepayment penalty which appears in the contract was invoked due to plaintiff's acceleration of the debt. Finally, defendant alleges that plaintiff inflated and assessed excessive costs and other charges at the closing.

In the current application, plaintiff claims that it is entitled to summary judgment because it has established a *prima facie* case for foreclosure by submitting copies of (1) the subject note and mortgage, (2) proof of mailing of the requisite default notice, and (3) an affidavit by its vice president attesting to the default and that the default has remained uncured.

Plaintiff further contends that the bare denials in defendant's answer should not preclude this Court from granting summary judgment, and that defendant's first affirmative defense alleging that plaintiff violated General Business Law §349, should be stricken because it is

insufficiently pleaded and makes conclusory assertions with regard to plaintiff's actions and fails to satisfy the elements of General Business Law §349. According to plaintiff, defendant has failed to establish that plaintiff committed acts that were (1) consumer-oriented and were recurring in nature and harmful to the public at large; (2) misleading in a material way; and (3) injurious to defendant. Plaintiff further asserts that defendant's claim -- that her income was exaggerated on a loan application which she signed, or that the fees and costs charged at closing were inflated or excessive -- are merely stated in conclusory fashion and without the benefit of any further comparison or detail. As a result, they are legally insufficient to support her claims.

According to plaintiff, the subject loan was not "consumer-oriented" as required by General Business Law §349, since its terms were particularly unique to the parties in this case. Thus, they could not have had any broad impact on consumers at large. In explication, plaintiff contends that this was a private contract between itself and defendant; was uniquely tailored to meet her specific needs and situation; and therefore, does not fall within the ambit of the cited section. Also lacking, according to plaintiff, is the reference to any specific act by plaintiff that was misleading in a material way, or that defendant was injured as a result thereof.

As for the affirmative defense that plaintiff's conduct was part of a "common law scheme to defraud," plaintiff argues that the claim is factually baseless, without merit, and not stated with the particularity required by CPLR 3016(b). Contrary to defendant's claims, it was she who provided plaintiff with the personal information used to generate the loan, which she executed without inquiry or objection. Moreover, defendant must be deemed to have ratified the closing documents by her failure to exercise her right to cancel the loan within the applicable three-day period following closing. Additional ratification is alleged to be found in the fact that defendant made the required monthly payments without objection or reservation for an entire year prior to her default. Accordingly, defendant's present claim that she does not have the income to repay the loan, or that she knew at the outset that she would be unable to do so, rings hollow.

In addition, defendant has failed to offer any proof that plaintiff engaged in any deceptive, predatory or fraudulent practices in granting the loan, *e.g.*, there is no proof that defendant's income was exaggerated or misrepresented on the application or its terms distorted in any way. Rather, plaintiff was damaged by its reliance on the information supplied by defendant on her loan application regarding, *e.g.*, her 2005 and 2006 (but not 2007) income tax returns and pay stubs. In short, while defendant now claims to have been well aware of her financial inability to repay the loan when she executed the Note and Mortgage, she nevertheless failed to exercise her right to rescind or cancel the loan.

As for the terms of the prepayment premium, plaintiff alleges that they were disclosed to defendant numerous times prior to the closing of the loan, and that it clearly appeared in (1) the Note and its Addendum, (2) the Loan Proposal directly above defendant's signature, and (3) the Truth-In-Lending Disclosure statement. According to plaintiff, this documentary proof directly contradicts defendant's claim of non-disclosure.

In opposing the motion, defendant contends that she did not inflate her income, and truthfully disclosed to plaintiff that her income was \$80,000 per year, but claims that it was plaintiff's employee who filled out the application stating that her monthly income was \$11,510.42, or \$134,125.04 per year. Although failing to set forth the amount requested, defendant claims that it was based solely upon this erroneous misinformation that her loan was approved in the amount of \$550,000.00.

As for plaintiff's alleged violation of General Business Law §349, defendant contends that since plaintiff is a financial institution in the business of providing mortgages, the subject transaction should be regarded as consumer-oriented and as having a broad impact on consumers generally. Moreover, while acknowledging that each mortgage application and loan is tailored to the particular needs and circumstances of the individual applicant, defendant argues that this does not convert every loan and mortgage into a "single-shot" transaction with no effect upon

anyone other than the mortgagor and mortgagee. Instead, she maintains that plaintiff's conduct has the potential to affect any unknown number of similarly-situated borrowers.

As for the requirement that the challenged conduct be deceptive in some material way, defendant returns to her claim that plaintiff knowingly exaggerated her income in order to make the loan, and cites this as clear evidence of deceptive and predatory consumer conduct that is likely to mislead borrowers at large. According to defendant, the loan application was processed over the telephone, and she provided plaintiff's representative with accurate information only. She also claims that she did not have the opportunity to review the actual application prior to the closing, and therefore could not know that plaintiff was using the income stated on her 2006 income tax return as representative of her present income. However, she also states that she does not even recall signing the application, and that she did not notice that it incorrectly listed her income as \$11,510.42 per month until after the loan had closed. As a result, defendant claims that she had no way of knowing that plaintiff had inflated her income in order to make the loan. Finally, defendant maintains that she was unaware of the severe prepayment penalty contained in the note, although she admits that she made inquiries regarding this particular term, and that it was modified slightly at her request. According to defendant, she was pressured into signing the note at the closing.

It is well settled that a proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact ( *see, Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once this initial burden has been satisfied, the burden of production shifts to the party opposing the motion to lay bare its proof and adduce sufficient evidence demonstrating the necessity of a trial (*id.*).

Here, plaintiff's documentary evidence successfully established its prima facie entitlement to judgment as a matter of law (*see, Coppa v. Fabozzi*, 5 AD3d 718 [2<sup>nd</sup> Dept. 2004]). On the

other hand, defendant produced only unproven allegations of plaintiff's wrongdoing in opposition. Mere conclusory allegations of alleged wrongdoing are insufficient to defeat a motion for summary judgment (*see, Federal Home Loan Mortgage Corp. v. Karastathis*, 237 AD2d 558 [2<sup>nd</sup> Dept. 1997]).

Accordingly, it is

ORDERED that plaintiff's motion is granted in its entirety.

Order signed herewith.

Dated: December 23, 2009

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J.S.C.