[* 1]

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

PRESENT: HON. PAUL G. FEINMAN PART 12

Justice

EMIGRANT MORTGAGE COMPANY, Inc.

- v -

EUGENE A. DANIELS, III and CHARLENE G. DANIELS, et al.

INDEX NO. 105057/08

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Cross-Motion: X Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This judgment has not been entered by the County Clerk and notice of entry cannot be given. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Referee to Compute Appointed: Regina L. Darby, Esq.

Dated: January 13, 2010 4:40 pm

Paul G. Feinman J.S.C.

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

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

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

----------X

EMIGRANT MORTGAGE COMPANY, INC.,
Plaintiff,

Index Number 105057/2008

- against -

EUGENE R. DANIELS, III and CHARLENE G. DANIELS,
Defendants.

DECISION and ORDER

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For the Plaintiff:
Belkin Burden Wenig & Goldman, LLP
By: William M. Rifkin, Esq.
270 Madison Ave
New York, NY 10016
(212) 867-4466

For Defendants:
Eugene R. Daniels III and Charlene G. Daniels, Esq. *pro se*
408 West 145th Street
New York, NY 10031

Papers considered in review of these motions:

Papers	**Numbered**
Verified Complaint and annexed exhibits	1
Answer	2
Verified Reply to Counterclaim	3
Motion for Summary Judgment and annexed exhibits	4
Notice of Cross Motion	5
Affirmation in Opposition to Cross Motion	6
Reply Affirmation in Support of Cross Motion	7
Order dated 6/4/2009	8
Order dated 7/1/2009	9
Plaintiff's Memo of Law	10
Defendants' Affidavit dated 7/31/2009	11
Plaintiff's Letter dated 8/7/2009	12

PAUL G. FEINMAN, J.:

Plaintiff moves (1) to strike defendants' answer; (2) for summary judgment and (3) to substitute "John Doe" and "Mary Doe" with Horace Copeland as a defendant. Defendants cross-move (1) to strike plaintiff's complaint for alleged failure to comply with discovery demands, and (2) to amend the answer by adding the affirmative defense and counterclaim for fraudulent inducement. For the reasons set forth below, the branches of plaintiff's motion which seek to amend the caption and have summary judgment entered in tits favor are granted. The branch of

the motion which seeks to strike the answer is denied. The branch of defendant' cross-motion which seeks to strike the complaint is denied, as is the branch seeking amendment of their answer.

Background

Plaintiff is the holder and owner of a mortgage and an adjustable rate loan note which defendants executed on April 20, 2007 for premises located at 408 West 145th Street, New York County (Compl., Exs. C-D). According to plaintiff, defendants failed pay the sum owed on December 1, 2007, and thereafter defaulted (Compl. ¶ 17).

On April 8, 2008, plaintiff commenced this foreclosure action and later moved for summary judgment. The motion was held in abeyance pending settlement negotiations held pursuant to this court's order. In accordance with chapter 472 of the Laws of 2008, this court later restored plaintiff's motion for summary judgment to the active motion calendar and directed the parties to submit memoranda of law addressing whether the loan falls within the scope of NY RPAPL § 1304 (c) or constitutes a "[h]igh-cost home loan" under Banking Law § 6-l (Order, dated 6/4/2009) (*see* L 2008, ch 472, § 2). During the initial stages of the proceedings defendants were represented by counsel. Then, by order dated July 1, 2009, this court granted defense counsel's motion to withdraw, adjourned plaintiff's motion for summary judgment, and stayed the action until July 31, 2009 in order to permit defendants an opportunity to retain either paid or *pro bono* counsel (Order, dated 7/1/2009). Defendants did not succeed in retaining counsel, although the court notes that defendant Charlene G. Daniels is an attorney.[1] Now, in accordance

[1] The court notes that when this action was assigned to this part at its inception, the court disclosed on the record its passing familiarity with Ms. Daniels inasmuch as she served as a court attorney in the "pool" of Criminal Court court attorneys and was assigned to another judge, when this court, then a Civil Court judge, was assigned to

with the June 4, 2009 order, plaintiff submits a memorandum of law and defendants submit an affidavit in support of their respective positions (Aff. dated 7/31/2009).

Analysis

I. Plaintiff's Motion to Amend the Caption

Plaintiff moves to amend the caption to delete "John Doe" and "Mary Doe" as defendants and to add "Horace Copeland" as a defendant. In an attempt to effectuate service of process upon possible tenants of the subject premises, plaintiffs served process under the fictitious names, which revealed that Horace Copeland was one such tenant. Plaintiff submits an affidavit of service which shows that personal service was effectuated upon Copeland on April 17, 2007 (Mot. for Summ. Jment., Ex. 13). To date, Copeland has not appeared. Thus, this branch of plaintiff's motion is granted (*see generally Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer*, 67 AD3d 872, 872 [2d Dept 2009]).

II. Plaintiff's Motion for Summary Judgment

Plaintiff also moves for summary judgment. The proponent of a motion for summary judgment bears the initial burden of establishing entitlement to judgment as a matter of law (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) by offering credible evidence demonstrating the absence of triable issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). To do so in this foreclosure action, plaintiff must produce the mortgage instruments and evidence of default (*see Eastern Sav. Bank, FSB v Sassouni*, __ AD3d __, 2009 NY Slip Op 09421, *1 [2d Dept 2009]; *Red Tulip, LLC v Neiva*, 44 AD3d 204, 209 [1st Dept

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sit in the Criminal Court at 100 Centre Street, New York, NY (January 1997–January 2000 and April 2001–October 2001). While it is hardly clear that this warrants disqualification pursuant to 22 NYCRR 100.3 (E), the court disclosed this information on the record and offered to disqualify itself. Upon remittal of any potential disqualification, all parties agreed that the court should not be disqualified. 22 NYCRR 100.3 (F).

2007], *lv dismissed* 10 NY3d 741 [2008]). Also, under Laws of 2008 (ch 472), homeowners at risk of foreclosure are entitled to greater protections if their home loans fall within certain criteria. If those provisions are not applicable or plaintiff demonstrates that they have been complied with, the burden would then shift to defendants to raise a triable question of fact (*see Torkel v NYU Hosps. Ctr.*, 63 AD3d 587, 592 [1st Dept 2009]) and evidence would viewed in the light most favorable to defendants (*see Brown v Muniz*, 61 AD3d 526, 531 [1st Dept 2009]).

Here, in support of its motion, plaintiff submits the following evidence: (1) the pleadings including the summons, verified complaint, notice of foreclosure, and defendants' answer; (2) the relevant affidavits of service; (3) the note and mortgage instruments; (4) the transaction history which evinces defendants' default; (5) the affidavit of Joel Marcano, Assistant Treasurer of Emigrant Mortgage Company, who has first hand knowledge of the basis for liability, explaining the aforementioned documents; (6) a copy of the loan application and loan commitment; and (7) the affidavit of James A. Raborn, First Vice-President/Director of Foreclosures and Real Estate Owned of Emigrant Mortgage Company, who also has first-hand knowledge of the basis for liability (Compl., Exs. C-D; Ex. Mot, Ex. 14; Raborn Aff. Exs. 2-6).

Plaintiff essentially argues that the foregoing entitles it to summary judgment because the loan at issue is neither a subprime home loan nor a high-cost home loan such that it would fall within the scope of those protections. As to the former, plaintiff argues that the loan at issue does not fall within the scope of RPAPL § 1304 (c) because the annual percentage rate did not exceed three percentage points over the yield on treasury securities having comparable periods of maturity (Memo of Law, at 3). For a first lien mortgage loan to constitute a "[s]ubprime home loan," it must (1) have been"consummated between January [1, 2003] and September [1, 2008]"

(RPAPL § 1304 [5] [c]); and (2) "the annual percentage rate of the home loan at consummation of the transaction [must] exceed[] three percentage points over the yield on treasury securities having comparable periods of maturity to the loan maturity measured as of the fifteenth day of the month in which the loan was consummated" (RPAPL § 1304 [5] [d]; *see Butler Capital Corp. v Cannistra*, 2009 NY Slip Op 29460, *4 [Sup Ct, Suffolk County 2009]).

Next, plaintiff argues that the loan at issue does not constitute a high-cost home loan under Banking Law § 6-l (1) (d) because (1) the interest rate "was within the eight (8) percentage points" of the yield on comparable treasury securities (Banking Law § 6-l [g] [i]), and (2) the "total points and fees [did not] exceed five (5%) of the total loan" (Banking Law § 6-l [g] [ii]). For a first lien mortgage loan to constitute a high-cost home loan under Banking Law § 6-l (1) (d), "the annual percentage rate of the home loan at consummation of the transaction [must] exceed[] eight percentage points over the yield on treasury securities having comparable periods of maturity to the loan maturity measured as of the fifteenth day of the month immediately preceding the month in which the application for the extension of credit is received by the lender" (Banking Law § 6-l [g] [i]). A home loan is also deemed a high-cost home loan if the loan is over $50,000.00 and "[t]he total points and fees exceed: five percent of the total loan amount" (Banking Law § 6-l [g] [ii]; *see Butler Capital Corp. v Cannistra*, 2009 NY Slip Op 29460, *4 [Sup Ct, Suffolk County 2009]).

Here, the loan was clearly "consummated" within the prescribed period inasmuch as the parties executed a first lien mortgage and adjustable rate loan note on April 20, 2007 (Compl., Exs. C-D) (*see Deutsche Bank Trust Ams. v Eisenberg*, 24 Misc 3d 1205[A], *3 [Sup Ct, Suffolk County 2009]. The court notes that official website of the Federal Reserve Statistical Data lists

the interest rate on 30-year Treasury constant maturities on March 15, 2007 as 4.69% (*see* http://www.federalreserve.gov/Releases/H15/data/Business_day/H15_TCMNOM_Y30.txt.). The note provides for an interest rate of 6.875% per annum until May 1, 2012 (Compl., Ex. C, Adjustable Rate Note ¶¶ 3, 4). Thereafter, the interest rate would have been subject to adjustment, but capped at 11.875% (Compl., Ex. C, Adjustable Rate Note ¶ 3). Under the Default Interest Rate Rider, which was contemporaneously executed, failure to "make a full monthly payment on or before the last day of the month in which said monthly payment is due" shall render the loan in "Extended Default" at which point the interest rate on the loan would be 18% per annum (Compl., Ex. C, Default Interest Rate Rider). Here, to determine if the "threshold" is met, the statute looks to the interest rate "at consummation of the transaction," which was 6.875% per annum (RPAPL § 1304 [5] [d]) (Compl., Ex. C, Adjustable Rate Note ¶¶ 3, 4). This is distinguishable from the 18% per annum default rate of interest (*see Hicki v Choice Capital Corp.*, 264 AD2d 710, 710 [2d Dept 1999] ["It is well settled that the defense of usury does not apply where . . . the terms of the mortgage and note impose a rate of interest in excess of the statutory maximum only after default or maturity"] [quotations omitted]; *Miller Planning Corp. v Wells*, 253 AD2d 859, 860 [1999]; *Tufano Contr. Corp. v State of New York*, 28 AD2d 951, 951 [2d Dept 1968], *affd* 23 NY2d 730 [1968] [distinguishing, for the purposes of determining usury, a loan's rate of interest from the rate after default or the rate after maturity]).

Turning to Banking Law § 6-l (g) (ii), because the "total loan amount" was $850,000.00, the 5% threshold is $42,500.00 (Compl., Ex. C; Raborn Aff., Ex. 4). The loan commitment plainly and conspicuously shows the total points and fees as $29,750.00 (Raborn Aff., Ex. 4). Thus, the loan does not constitute a high-cost home loan.

Defendants' arguments in opposition are, as a matter of law, unavailing. For example, defendants' conclusory allegation that plaintiff "never advise[d them] in any manner, written or verbal, that in the event of any default, the interest rate on the loan would be increased to [18%]" (Charlene G. Daniels Aff. ¶¶ 9, 13). This is belied by the documentary evidence. The loan commitment, which defendants themselves submit, predates the loans and clearly lists the default interest rate of 18% (Cross Mot., Ex. F; Raborn Aff., Ex. 4). Also, the Default Interest Rate Rider, which is prominently and boldly labeled as such in capital letters, unambiguously provides for an interest rate of 18% in the event of default (Compl., Ex. C, Default Interest Rate Rider). Defendants entirely fail to refute plaintiff's prima facie case with any evidence other than their conclusory allegations and, accordingly, have failed to "come forward with evidence sufficient to raise a fact issue" to withstand summary judgment (*CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]; *see Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer*, 67 AD3d 872, 872 [2d Dept 2009]; *LoBianco v Lake*, 62 AD3d 590, 590-591 [1st Dept 2009]). Nor have defendants offered a meritorious defense (*see* Point III, *infra*) (*see JP Morgan Chase Bank, N.A. v Bruno*, 57 AD3d 362, 364 [1st Dept 2008]).

This court is mindful of the policy considerations behind and the remedial nature of the legislation at issue as well the statutory maxim that such "statutes [be] liberally construed to carry out the reforms intended and to promote justice" (Statutes § 321; *see* Sponsor's Mem., 2008 NY Senate Bill 8143A; *Butler Capital Corp. v Cannistra*, 2009 NY Slip Op 29460, *6-7; *Indymac Fed. Bank FSB v Black*, 22 Misc 3d 1115(A), *1 [Sup Ct, Rensselaer County 2009]). Indeed, the court required the parties to attempt negotiations before a judicial hearing officer. Negotiations reached an impasse when, among other problems, the plaintiff would not

compromise on its default rate and the defendants were unable to comply with requests to document an ability to pay out the arrears while meeting future payments. While the court does not condone the intransigence of plaintiff on the issue of the default rate being non-negotiable, it would be an error, as a matter of law, to construe the loan at hand as either a subprime home loan or high-cost home loan. Therefore, plaintiff's motion for summary judgment must be granted.

III. Defendants' Motion for Leave to Amend the Answer

Defendants' answer alleges the affirmative defenses of usury, economic duress, failure to state a cause of action based upon documentary evidence, and failure to state a cause of action upon which relief may be granted (Answer). Now, defendant seeks leave to amend the answer to add the affirmative defense and counterclaim for fraudulent inducement (Cross Mot.).

Leave to amend pleadings "shall be freely given" (CPLR 3025 [b]) unless the proposed amendment is prejudicial (*see Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009], *lv dismissed* 12 NY3d 880 [2009]) or "palpably improper" (*Janssen v Incorporated Vil. of Rockville Ctr.*, 59 AD3d 15, 22 [2d Dept 2008]). This determination "is committed to the court's discretion" (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; *see Murray v City of New York*, 43 NY2d 400, 404-405 [1977]).

Defendants' argue that they were fraudulently induced into entering the agreement by plaintiff's alleged "failure to properly advise [them of] the terms and conditions" (Charlene G. Daniels Aff. ¶¶ 11-14). Not only is the record bereft of any support thereof, but it actually supports the contrary (*see* Point II, *supra*). Additionally, defendants pleadings are not sufficiently particularized for the purposes of stating such a claim or defense, let alone prevailing thereon (*see* CPLR 3016 [b]; *Rather v CBS Corp.*, 2009 NY Slip Op 06738, * 8 [1st Dept 2009],

lv denied 886 NYS2d 121 [Jan. 12, 2010]). For these reasons, defendants' averments are "palpably insufficient as a matter of law" and this court must deny defendants' motion for leave to amend the answer to add fraudulent inducement as an affirmative defense and counterclaim (*Davis & Davis v Morson*, 286 AD2d 584, 585 [1st Dept 2002]; *Mance v Mance*, 128 AD2d 448, 449 [1st Dept 1987]).

IV. Plaintiff's Motion to Strike Defendants' Answer

The court need not address the merits of plaintiff's motion to strike defendants' answer because it is rendered academic by this order's resolution of plaintiff's motion for summary judgment (*see Purgatorio v Trump*, 198 AD2d 37, 38 [1st Dept 1993]; *Carr v Integon Gen. Ins. Corp.*, 185 AD2d 831, 832 [2d Dept 1992]).

V. Defendants' Motion to Strike the Complaint

Finally, defendant moves to strike the complaint because of plaintiff's alleged failure to respond to discovery demands (Cross Mot., Miller Aff. ¶¶ 10-13). This court is vested with broad discretion regarding the manner in which it supervises disclosure (*see Cirillo v Macy's, Inc.*, 61 AD3d 538, 540 [1st Dept 2009]; *Byam v City of New York*, __ AD3d __, 2009 NY Slip Op 09176, *2 [2d Dept 2009]). The competing accounts of the circumstances do not evince "willful behavior" nor conduct warranting a sanction as harsh as striking the complaint (*compare* Miller Aff. *with* Rifkin Aff. in Opp.) (*see Sosa v Kasim*, 48 AD3d 320, 320 [1st Dept 2008]). The court also notes that defendants never moved to compel compliance with those demands. Considering the severity of the sanction sought and the enormity of prejudice that plaintiff would suffer, this court finds that granting defendants' motion would constitute an abuse of that discretion (*see Kugel v City of New York*, 60 AD3d 403, 403 [1st Dept 2009]; *Matter of Witham*

v Finance Invs., Inc., 52 AD3d 279, 282 [1st Dept 2009]). Therefore, defendants' motion to strike the complaint is denied.

It is

ORDERED that the caption shall be amended to reflect the deletion of "John Doe" and "Mary Doe" as defendants and the addition of "Horace Copeland" as a defendant as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12
----------X
EMIGRANT MORTGAGE COMPANY, INC.,
Plaintiff, Index Number 105057/2008

- against -

EUGENE R. DANIELS, III, CHARLENE G. DANIELS, NEW YORK CITY PARKING VIOLATIONS BUREAU, CHERYL COPELAND, CHARLENE JACKSON, RSZ INC., CHERYL LYNN GLOVER a/k/a CHERYL JONES, NEW YORK STATE COMMISSIONER OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF TAXATION AND FINANCE, and HORACE COPELAND,
Defendants.
----------X,

and it is further

ORDERED that defendants' motion to strike the complaint is denied; and it is further

ORDERED that defendants' motion to amend the answer is denied; and it is further

ORDERED that plaintiff's motion to strike defendants answer is denied as academic; and it is further

ORDERED, DECLARED and ADJUDGED that the home loan entered into by the

parties does not constitute a subprime home loan under RPAPL § 1304; and it is further

ORDERED, DECLARED and ADJUDGED that the home loan entered into by the parties does not constitute a high-cost home loan under Banking Law § 6-l; and it is further

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

ORDERED that Regina L. Darby, Esq., 20 Vesey Street, 3rd Floor, New York NY 10007-2913, phone (212) 925-5040 is appointed as referee to ascertain and compute the amounts owed upon the note and mortgage being foreclosed in this action and to determine whether the property can be sold in one parcel; and it is further

JSC

ORDERED that, if required, said Referee shall take testimony pursuant to RPAPL § 1321; and it is further

ORDERED that by accepting this appointment the Referee certifies that she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to section 36.2 (C) ("disqualifications from appointment") and section 36.2 (d) ("limitations on appointments based on compensation"); and it is further

ORDERED that plaintiff shall serve a copy of this order upon the Clerk of Court (60 Centre Street, Basement) and the Clerk of Trial Support (60 Centre Street, Room 158) who shall mark their files, records, and papers to reflect the amended caption; and it is further

This constitutes the decision and order of the court.

Dated: January 13, 2010 8:42 P.M.
New York, New York

Paul G. Feinman
J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).