

**People v J.P. Morgan Chase Bank, N.A.**

2010 NY Slip Op 30099(U)

January 19, 2010

Supreme Court, New York County

Docket Number: 103486-2009

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT:

PART 10

Index Number : 103486/2009

MATORESE, EUGENE

VS.

J.P. MORGAN CHASE, BANK, N.A.

SEQUENCE NUMBER : 001

DEFAULT JUDGMENT

18

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

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

**FILED**

JAN 20 2010

NEW YORK  
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.

*and conference scheduled in  
part 10 2/25/2010 @ 9:30 am*

Dated: January 19, 2010

*JJG*  
JUDITH J. GISCHE, J.S.C. J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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 10**

-----X

Eugene Matarese,

Plaintiff (s),

**-against-**

J.P. Morgan Chase Bank, N.A.,  
Chase Home Finance, LLC,  
Chase Manhattan Mortgage Corp.,  
Imperial Mortgage, NY,  
Genesis Home Mortgage Corp.,  
X, Y, and Z,

Defendant (s).

-----X

**DECISION/ ORDER**

Index No.: 103486-2009

Seq. No.: 001

**PRESENT:**

Hon. Judith J. Gische

**J.S.C.**

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

**Papers**

- Pltf n/m (3215) w/TRB affirm, exhs .....
- Def Genesis x/m (3211) w/MEN affirm, RR affid, exhs .....
- Pltf's reply and opp w/TRB affirm, EM affid, exhs .....
- Defe Genesis reply w/MEN affirm .....
- OA transcript 11/12/09 .....

**Numbered**

**FILED**

JAN 5 0 2010

NEW YORK  
COUNTY CLERK'S OFFICE

*Upon the foregoing papers, the decision and order of the court is as follows:*

Gische J.;

This is an action alleging discriminatory practices by the defendants under the New York State Human Rights Laws (Executive Law § 296) and the New York City Administrative Code (NYCAC § 8-107[7]). Plaintiff has brought a motion for entry of a default judgment against defendant Genesis Home Mortgage Corp. ("Genesis") and Imperial Mortgage Corp. ("Imperial"). Genesis has cross moved for the dismissal of the

amended summons and complaint. Alternatively, Genesis seeks additional time to answer. Plaintiff opposes the cross motion. Imperial has not appeared in this action, nor does it oppose this motion. Apparently neither moving party served their respective motions on the Chase defendants.

### **Motion for Default Judgment**

Plaintiff served the summons and unverified complaint on April 1, 2009.

Thereafter, on April 29, 2009 (or thereabouts) plaintiff served an amended summons and unverified complaint. Meanwhile, after the summons and unverified complaint were served, plaintiff and an attorney for Genesis informally agreed that Genesis' time to answer the complaint would be extended. Later, the agreement was reduced to writing and set forth in correspondence, dated June 19, 2009, sent to plaintiff's attorney. That letter extended Genesis' time to appear in this action until July 15, 2009 and, ostensibly, was for the purposes of allowing it to obtain counsel.

On June 30, 2009 attorney Roberta Pike, Esq. ("Attorney Pike") appeared<sup>1</sup> on behalf of Genesis and demanded a copy of the complaint. The amended summons and unverified complaint were, apparently, never served on Genesis

In reply to Genesis' opposition to the motion for a default judgment, plaintiff argues that he did not have to serve the amended summons and complaint on Genesis (or Imperial) because the amendment only "corrected" the name of one of the Chase defendants and didn't involve Genesis or Imperial.

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<sup>1</sup>Attorney Pike later moved to be relieved as counsel. That motion was withdrawn and a substitution of counsel was filed (Order, Gische J., 10/19/09).

Assuming that plaintiff had the right to serve an amended complaint without seeking leave of court, plaintiff served the amended complaint after he extended Genesis' time to answer and the amended summons and complaint did not simply "correct" a name, but added two new parties: Chase Mortgage Services, Inc. and Chase Home Mortgage Corporation. Not only does the amended complaint supercede the original complaint (Halmar Distributors, Inc. v. Approved Mfg. Corp., 49 AD2d 841 [1<sup>st</sup> Dept 1975]), the addition of newly named defendants directly bears on any cross claims the named defendants may seek to assert. Importantly, the amended summons and unverified complaint are not part of the motion for entry of a default judgment against Genesis and Imperial.

Having failed to serve Genesis with the amended pleadings, and then omitting them from his motion for entry of a default judgment, plaintiff is not entitled to a default judgment in this case. The court has also considered that neither the original nor the amended complaint is verified and the motion for entry of a default judgment is not supported by the affidavit of a person with knowledge of the facts (Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62 [2003]). It is only in reply that plaintiff first provides his sworn affidavit.

Given these circumstances, the court denies plaintiff's motion for entry of a default judgment against defendant Genesis and plaintiff is compelled to accept the answer in the form proposed. The answer is deemed served, since it is an exhibit to the cross motion.

The court also denies the motion for entry of a default judgment against Imperial

because Imperial was never served with the motion nor was Imperial was ever represented by the attorney representing Genesis. In any event, the motion against Imperial is defective for the same reasons the motion against Genesis fails.

### **Cross Motion to Dismiss**

Since a motion to dismiss attacks the sufficiency of the complaint, the pleadings are afforded a liberal construction, the allegations therein are taken as true, and the plaintiff is given the benefit of every possible inference (Goshen v. Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Leon v. Martinez, 84 NY2d 83 [1994]; Morone v. Morone, 50 NY2d 481 [1980]; Beattie v. Brown & Wood, 243 AD2d 395 [1<sup>st</sup> Dept. 1997]). The complaint alleges the following and the parties make these arguments:

Plaintiff applied for a mortgage through one or more of the Chase entities named as defendants in this action. Paul Rubio ("Rubio"), a loan officer employed by Chase, notified plaintiff that Chase could not give him the loan requested. Rubio then referred plaintiff to defendants Genesis and/or Imperial Mortgage Corp. ("Imperial"). Plaintiff's contact at Genesis was Peter Motta ("Motta"). According to plaintiff, he was copied on an email sent by Rubio to Motta. The email, provided as an exhibit to plaintiff's opposition to the cross motion, contains the following:

"In a message dated  
10/16/2008 at 9:37:08 P.M. Central Daylight Time,  
pablo.e.rubio@gmail.com writes:  
Hehehe got the fag upset . . . Cuidate que te aruña.  
jajajaj"

Matarese then sent the following email to petemotta@imperialmortgageny.com,  
tosullivan@agmblaw.com; tripodR@emigrant.com which he also carbon copied to

pablo.e.rubio@gmail.com:

"Subject: FYI

Dear Mr. Motta:

You (sic) tone in your emails are (sic) disrespectful. I'm the client and I don't accept being contact in the tome (sic) and threatening manner. If this is a reflection on on Emigrant and Theresa I suggest they speak to you immediately. I'm not so desperate that I have to be treated as in the previous email. I never get any messages from you on my phone so I don't know what you are accusing me of! It is not only unfair but unprofessional. I'm in the City tomorrow and will drop off the check and the form at her office. I will sign the new equity line and bring it to Theresa.  
Eugene Matarese"

According to plaintiff, he received the following email after he complained:

Subject: Re: Urgent - Mr. John Bradley Chase  
Date: 10/16/2008 1:35:16 P.M. Central Daylight Time  
From: pablo.e.rubio@gmail.com  
To: ematarese@aol.com, petemotta@imperialmortgageny.com

"Matarese,  
I don't really know what your plans were but I really hope you are satisfied and as happy as I am. I won't say what I REALLY THINK OF YOU FAGI but I really hope after you leave this world you burn in hell.  
So long [m\_\_\_r f\_\_\_r]!!!"

Plaintiff claims that he was discriminated against and subjected to differential treatment in the extension of credit based upon his sexual orientation, even though he obtained the loan he applied for (1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> causes of action).

Plaintiff contends that Rubio's derogatory comments in the email to Motta indicate that Rubio and Motta were engaged in homophobic "conversation" and that this

conversation took place while each person was serving his respective employer. Plaintiff argues further these emails are evidence that Genesis (and the other defendants) failed to properly train its employees on the requirements of the State and City Human Rights Laws (5<sup>th</sup> and 6<sup>th</sup> causes of action) and that having breached that duty, the defendants caused him to suffer pecuniary and emotional injury (7<sup>th</sup> cause of action). Plaintiff contends that Genesis permitted its employee (Motta) to engage in malicious, anti-gay conduct which the employer knew or should have known was "intentionally designed to cause the plaintiff emotional distress" (8<sup>th</sup> cause of action) and that he suffered "severe emotional distress, requiring him to be hospitalized" for which he should receive compensatory and punitive damages. According to plaintiff, the actions of the defendants were beyond the scope of all civilized conduct, shock and offend public standards, were motivated by malice toward the plaintiff, and were undertaken for no other purpose than to injure the plaintiff, causing emotional and pecuniary injury (9<sup>th</sup> cause of action).

In support of its cross motion for summary judgment, Genesis argues that plaintiff did not name Rubio or Motta individually although those persons are alleged to have engaged in the homophobic "conversation." Genesis argues that even if Motta did receive the email, as alleged, there is no "conversation" or response by Motta which inculpates Genesis or indicates that Genesis knew about the alleged email, let alone condoned any of the language contained therein. Robert Ragonesi, President of Genesis, provides his sworn affidavit that plaintiff obtained the loan he applied for, which plaintiff accepted without any objection and, therefore, has no damages.

Plaintiff argues that it makes no difference that he received the loan he applied for because of the deplorable manner he was treated. He denies there is any need for him to have named the employees who wrote or received the email because they were acting on behalf of their respective employers. He claims further that defendant's motion to dismiss should be denied because it has not come forward with any "evidence" that Motta was properly trained that discrimination in credit is illegal.

**Discussion**

Affording the complaint a liberal construction, taking the allegations therein as true, giving plaintiff the benefit of every possible inference, and even taking into account the statements provided in plaintiff's sworn affidavit in opposition to Genesis' motion to dismiss, plaintiff has no cause of action against Genesis.

Although plaintiff contends that Rubio and Motta were communicating about him in emails, his facts and the email provided only show that an email was sent from Rubio's private email to Motta at Imperial Mortgage. There are no facts to support a claim that Rubio and Motta were engaged in "conversations" about plaintiff. Assuming as true that the emails were sent, there are no facts that Motta received these highly charged emails while employed by Genesis. The email address they were sent to show an Imperial, not Genesis, domain. Plaintiff has presented no legal authority that receipt of homophobic email may give rise to a cause of action. Therefore, the complaint fails to set forth any allegations which, if true, would justify holding Genesis liable for Motta having received the complained of emails from Rubio.

Plaintiff alternatively contends these emails show Genesis allowed private information about him to be used "off site" and that this is a breach of Genesis' duty to him. As a general matter, a bank may have a duty to keep a customer's banking transactions confidential (Young v. U.S. Dept. of Justice, 882 F.2d 633 [2nd Cir. 1989] *cert. den.* 110 S. Ct. 1116 [1990]; Aaron Ferer & Sons, Ltd. v. Chase Manhattan Bank, 731 F.2d 112, 123 [2nd Cir. 1984]; Sharma v. Skaarup Ship Management Corp., 699 F.Supp. 440 [S.D.N.Y. 1988]). Here, however, the emails contain personal attacks, not financial information, and therefore plaintiff presents no facts that Genesis violated any duty owed to him.

Under §296-a of New York's Human Rights Law, it is an unlawful discriminatory practice for a bank to discriminate against an applicant for credit (N.Y. Exec. Law §296-a; Binghamton GHS Employees Federal Credit Union v. State Div. of Human Rights, 77 N.Y.2d 12 [1990]). Plaintiff contends that although he received the loan he applied for, he was discriminated against because of his sexual orientation. In his sworn affidavit plaintiff adds that although he received the loan he is not sure whether he received "the most competitive rate . . ."

On a motion to dismiss the court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (Leon v. Martinez, 84 N.Y.2d at 88) and the criterion is whether the proponent of the pleading "has" a cause of action, not whether he has stated one (Id.)

Plaintiff has not, either in the complaint or his supporting affidavit, alleged any facts that he was discriminated against on the basis of sex in the fixing of the rate,

terms or conditions of the loan he received from Genesis. His statement that he is not sure whether he received the most competitive rate is simply too vague. Plaintiff has not identified any term, condition, rate, etc. that he applied for (or expected to get) but was denied. Therefore, plaintiff has no cause of action against Genesis for discrimination in the granting or withholding of credit.

Plaintiff's allegation that the existence of the emails is proof Motta was improperly trained in the principles of the Human Rights Laws does not support a cause of action for negligent "training" - - assuming even such a cause of action exists. While factual allegations in a complaint should be accorded favorable inference, bare legal conclusions are not entitled to preferential consideration (Sud v. Sud, 211 A.D.2d 423, 424 [1<sup>st</sup> Dept 1995]).

In sum, plaintiff's factual allegations, as amplified by his sworn affidavit and his exhibits do not support any cause of action against Genesis, even affording the complaint a liberal construction. Therefore, Genesis' motion for the dismissal of plaintiff's claims against it is granted. The clerk shall enter a judgment of dismissal against plaintiff and in favor of defendant Genesis Home Mortgage Corp.

It is unclear whether this action was properly commenced against the Chase defendants who were not served with these motions. Under these circumstances, the court schedules this case for a **conference on February 25, 2010 at 9:30 a.m. in Part 10** and directs that plaintiff serve a copy of this decision on the Chase defendants and Imperial and bring proof of service to the conference.

**Conclusion**

In accordance with the foregoing,

It is hereby

**ORDERED** that plaintiff's motion for entry of a default judgment against defendants Genesis and Imperial is denied for the reasons provided; and it is further

**ORDERED** that Genesis' cross motion is granted in its entirety and the claims against Genesis are hereby severed and dismissed; and it is further

**ORDERED** that the clerk shall enter a judgment of dismissal against plaintiff and in favor of defendant Genesis Home Mortgage Corp.; and it is further

**ORDERED** that this case is scheduled for a conference on February 25, 2010 at 9:30 a.m. in Part 10; plaintiff shall serve a copy of this decision on the Chase defendants and Imperial and bring proof of service to the conference; and it is further

**ORDERED** that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

**ORDERED** that this constitutes the decision and order of the court.

Dated: New York, New York  
January 19, 2010

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.

**FILED**  
JAN 20 2010  
NEW YORK  
COUNTY CLERK'S OFFICE