Flushing Sav. Bank, FSB v Goetz
2010 NY Slip Op 30614(U)
March 11, 2010
Supreme Court, Suffolk County
Docket Number: 09-1442
Judge: Ralph T. Gazzillo
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SHORT FORM ORDER

INDEX No. 09-1442

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Justice of the Supreme Court

MOTION DATE 6-4-09
ADJ. DATE 11-5-09
Mot. Seq. # 001 - MD

FLUSHING SAVINGS BANK, FSB,

Plaintiff,

- against -

PAUL K. GOETZ, ANDREW P. GOETZ
ET AL.,

Defendants.

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Upon the following papers numbered 1 to 32 read on this motion for summary judgment and related relief; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 19 - 23; Replying Affidavits and supporting papers 24 - 32; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by plaintiff for, *inter alia*, an order granting it summary judgment, an order appointing a referee to compute the amounts due, and for an order amending the caption, is denied without prejudice and with leave to renew upon proper proof.

This action was commenced on January 8, 2009, to foreclose a mortgage on premises located at 492 and 494 West Main Street, in Patchogue, New York. It appears that 492 and 494 West Main Street are two separate parcels with each parcel having one residential structure and one commercial structure. Both the residential structure on 492 West Main Street and the residential structure on 494 West Main Street are located at the front of the parcels with the commercial structures being located at the rear of the parcels. On March 2, 1999, Andrew P. Goetz and Nancy T. Goetz, residing at 492 West Main Street, and Paul K. Goetz and Alice J. Goetz, residing at 494 West Main Street, signed a note to obtain a loan from the plaintiff, Flushing Savings Bank, FSB, in the sum of $360,000.00 at a yearly interest rate of 8.25 percent. Andrew P. Goetz and Paul K. Goetz (hereinafter "the Goetz defendants") also executed a mortgage agreement dated March 2, 1999 which secured said note with a mortgage on the entire premises.

Thereafter, on August 17, 2005, the Goetz defendants signed a note to obtain a loan for an additional $435,826.15, which note states that it is consolidated and restated to form a single lien in the amount of $675,000.00. This note also states in pertinent part that interest would be computed for the first

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five years (the initial term) at a rate of 7.000 percent, but that every five year interval thereafter (the second, third, fourth, fifth and sixth terms), interest would adjusted to an interest rate equal to the greater of the prior term's interest rate or "225 basis points in excess of the Bank's cost of borrowing five (5) year money from the Federal Home Loan Bank of New York, as determined by the Bank, as of sixty (60) days prior" to the adjustment date. In addition, the Goetz defendants executed a mortgage and consolidation agreement dated August 17, 2005 which secured the consolidated debt with a mortgage on the subject premises.

The Goetz defendants allegedly defaulted on their September 1, 2008 monthly loan payment and on subsequent installments, whereupon the plaintiff elected to accelerate the loan and commence this action. The Goetz defendants served an answer raising three affirmative defenses: the first affirmative defense alleges that the complaint fails to state a cause of action; the second affirmative defense alleges that the court lacks jurisdiction because the summons does not contain the notice required by RPAPL §1320; and the third affirmative defense alleges that the court lacks jurisdiction because the plaintiff failed to serve the notice required by RPAPL §1304.

The plaintiff now moves for, among other things, an order granting it summary judgment, an order appointing a referee to compute the amount due, and an order amending the caption by adding Paul's Rug Works, Inc. to the caption in place of "John Doe No.1" and by striking therefrom the remaining defendants shown herein as "John Doe No.2 through John Doe No.10." In support of its motion, the plaintiff submits, *inter alia*, a copy of: the notice of pendency; the summons; the verified complaint; the supplemental summons; the affidavits of service; notices of appearance and waiver of various defendants; the verified answer of the Goetz defendants; the note, dated March 2, 1999; the mortgage, dated March 2, 1999; the note, dated August 17, 2005; the mortgage and consolidation agreement, dated August 17, 2005; commercial and residential leases involving the premises; a survey of the premises; and supporting affidavits.

One such supporting affidavit is by the plaintiff's vice-president, Leonard Cecere, who alleges the Goetz defendants' answer is a sham and their affirmative defenses are devoid of merit. As to the first affirmative defense, Mr. Cecere points to copies of the note and mortgage, and argues that the Goetz defendants executed, acknowledged and delivered the note and mortgage to plaintiff, and then defaulted under the terms of the note and mortgage. Mr. Cecere alleges that there can be no doubt that the complaint does set forth a cause of action for foreclosure, and the evidence submitted herewith establishes the plaintiff's prima facie case for foreclosure. As to the second affirmative defense, Mr. Cecere alleges that the premises being foreclosed contains four units, two of which are used for commercial purposes, and as such, the premises fall outside of the requirements of RPAPL §1320. In any event, alleges Mr. Cecere, a supplemental summons, amended to include the language required by RPAPL §1320, was filed on February 18, 2009. Mr. Cecere contends that since the plaintiff took affirmative steps to comply with RPAPL §1320 and served supplemental summons on the Goetz defendants, the plaintiff's service of the supplemental summons should be deemed compliance. As to the Goetz defendants' third affirmative defense, Mr. Cecere alleges that since the underlying premises are primarily commercial in nature, the notice pursuant to RPAPL §1304 is not required. Mr. Cecere points to several commercial and residential leases and alleges that the premises are clearly investment property, mixed-use in nature with two structures being used for commercial purposes. Mr. Cecere further alleges that he has been advised by counsel that the debt incurred by the Goetz defendants was not for personal, family, or household purposes, and thus does not come within the "home loan" definition under RPAPL §1304. Mr. Cecere alleges that, therefore, no notice is

required pursuant to RPAPL §1304, and that this affirmative defense is an attempt to delay these proceedings.

In opposition, the Goetz defendants submit, *inter alia*, the affidavit of Andrew Goetz. Mr. Goetz initially asserts that 492 and 494 West Main Street meet the requirements of RPAPL §1304. He alleges the he lives in the house located at 492 West Main Street and that his brother Paul lives in the house located at 494 West Main Street. He alleges that each house has one accessory apartment and that each house is intended for occupancy by two families. He also states that the debt was incurred for personal purposes. For example, alleges Mr. Goetz, part of the money borrowed went to the purchase of a motor home that cost over $70,000.00. In addition, he alleges that he and his brother lived off the proceeds of the loan in anticipation of the sale of the properties. Mr. Goetz also alleges that the principal amount of the loan at issue did not exceed the conforming loan size. He further maintains that an examination of the HUD statement from the closing shows that the total points and fees paid by him and his brother were $26,691.95, which amount exceeds the threshold amount as defined in Banking Law §6-*l* (1)(g)(ii). He contends that, thus, plaintiff was required to serve a notice meeting the requirements of RPAPL §1304 on the defendants at least 90 days prior to the commencement of this action.

As to RPAPL §1320, Mr. Goetz alleges that the plaintiff's assertion that this statute does not apply because the two properties are not intended to be used principally for residential occupancy, is a fabrication. The Goetz defendants point to the survey of the property submitted by the plaintiff, and allege that from this survey, it is evident that the portion of each property dedicated to residential use is about the same as the portion used for commercial purposes. Finally, as to their affirmative defense of failure to state a cause of action, the Goetz defendants allege that RPAPL §1302 requires that a complaint in actions relating to high cost home loans or subprime home loans contain certain affirmative allegations. The Goetz defendants contend that the complaint herein fails to contain the necessary allegations.

In reply, the plaintiff submits the Goetz defendants' loan application and alleges that the property at issue was presented to the plaintiff as a fully tenanted, mixed use, income producing property. In addition, the plaintiff submits an appraisal report, and contends that the property was appraised as a mixed-use income producing property. Furthermore, contends the plaintiff, RPAPL §1304 does not apply because the loan was not a "home loan." It alleges that the interest rate for the Goetz defendants' loan was seven percent (7.00%) per annum, so that it is not over the threshold set forth in Banking Law 6-*l*(1)(g). As to the total points payable on the loan, the plaintiff alleges that the Goetz defendants paid their mortgage broker one and one-half points to help procure the loan, and paid zero points to the lender.

It is well settled that the proponent of a summary judgment motion, bears the initial burden of making a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Norwest Bank Minnesota, N.A. v Sabloff***, 297 AD2d 722, 747 NYS2d 559 [2002]). Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposition papers (***De Santis v Romeo***, 177 AD2d 616, 576 NYS2d 323 [1991]). Here, the plaintiff has failed to meet its initial burden.

RPAPL §1320 provides that in an action to foreclose a mortgage on residential property containing not more than three units, in addition to the usual requirements applicable to a summons in the court, the summons shall contain a notice in the form provided, advising the property owner that, "YOU ARE IN

DANGER OF LOSING YOUR HOME" and of the need to serve and file an answer (*see* de Winter and Loeb, Practice Commentaries, McKinney's Cons Laws of NY, Book 49 ½ , RPAPL §1320, p.319). The intent of RPAPL §1320 is to provide additional protection to homeowners in foreclosure by requiring the mortgagee to provide additional notice to the mortgagor-homeowner that a foreclosure action has been commenced (***Butler Capital Corporation v Cannistra***, 26 Misc3d 598, 891 NYS2d 238 [2009]). In this case, since each residential property contained only two units, the plaintiff was required to serve the Goetz defendants with the §1320 special summons. Despite the plaintiff's claim to the contrary, the fact that there are also two buildings at the back of each lot used for commercial purposes, does not negate the residential nature of the two homes located at the front of each parcel. Moreover, the plaintiff's attempt to correct its failure to comply with RPAPL §1320, by serving a "supplemental summons" was improper. Although no penalty or remedy is set forth in §1320 for failure to comply, a plaintiff who fails to include the requisite language should seek leave of court to amend the summons under CPLR 305 (c), which permits the court to amend a summons if a substantial right of a party against whom the summons issued is not prejudiced (Torrent, Practice Insights, NY CLS, RPAPL §1320 [2010]). Accordingly, since the plaintiff has failed to submit sufficient proof that it complied with RPAPL §1320, its motion to strike the Goetz defendants' second affirmative defense is denied.

The plaintiff's motion to strike the Goetz defendants' third affirmative defense is also denied. RPAPL §1304, in relevant part, requires a lender, with respect to a "high-cost home loan" (as is defined in §6-*l* of the Banking Law), a "subprime home loan," or a "non-traditional home loan," to send a notice to the borrower at least ninety days before a lender commences a mortgage foreclosure action against such borrower. The notice must be in the form prescribed and include the warning "YOU COULD LOSE YOUR HOME" (*see* de Winter and Loeb, Practice Commentaries, McKinney's Cons Laws of NY, Book 49 ½ , RPAPL §1304, p.292; *see also* ***Bank of America v Guzman***, 2009 NY Slip Op. 29528, 892 NYS2d 846 [2009]). A "home loan" is defined under RPAPL §1304(5)(b) to mean a home loan, including an open-end credit plan, other than a reverse mortgage transaction, in which: "(i) The principal amount of the loan at origination did not exceed the conforming loan size that was in existence at the time of origination for a comparable dwelling as established by the federal national mortgage association; (ii) The borrower is a natural person; (iii) The debt is incurred by the borrower primarily for personal, family, or household purposes; (iv) The loan is secured by a mortgage or deed of trust on real estate upon which there is located or there is to be located a structure or structures intended principally for occupancy of from one to four families which is or will be occupied by the borrower as the borrower's principal dwelling; and (v) The property is located in this state." Banking Law §6-*l* (1)(e) defines a "home loan," in pertinent part, similarly.

In this case, the plaintiff has failed to provide sufficient proof that the loan at issue is not a "high-cost home loan," a "subprime home loan," or a "non-traditional home loan." The plaintiff's first argument, that because two of the buildings on the premises are commercial buildings and the property generates income from residential and commercial leases, the loan does not fall under the definition of a "home loan," is without merit. Both RPAPL §1304(5)(b)(iv) and Banking Law §6-*l*(1)(e)(iv), simply require "*a structure or structures intended principally for occupancy of from one to four families which is or will be occupied by the borrower as the borrower's principal dwelling*" (emphasis added). The notes and mortgages, as well as one of the affidavits of service, which were submitted by the plaintiff in support of its motion, indicate that the Goetz defendants resided at the premises. In addition, the survey and the leases demonstrate that at least two of the four structures were intended principally for occupancy of one to four families. Moreover, the loan application submitted by the plaintiff, specifically asked under section VIII, "Do you intend to

occupy the property as your primary residence?" to which Andrew Goetz answered, "yes." Furthermore, the Appraisal Report submitted by the plaintiff, states, "At the time of the inspection, the residential houses were occupied by the owners of the subject property, with each house containing a small studio apartment, which were leased to single tenants." Thus, although the property contains two commercial buildings, the two residential structures which were occupied by the Goetz defendants as their principal dwellings, fall within that portion of the definition of a "home loan" set forth in RPAPL §1304(5)(b)(iv) and Banking Law §6-*l*(1)(e)(iv).

Additionally, the plaintiff's next argument that this loan does not fall under the definition of a "home loan" because the debt was not incurred primarily for personal, family, or household purposes pursuant to RPAPL §1304(5)(b)(iii) and Banking Law §6-*l*(1)(e)(iii), is totally unsupported. The plaintiff's vice-president makes this claim based solely upon advice of counsel, without any explanation as to how counsel would have personal knowledge of the purpose of this loan.

Moreover, the plaintiff's arguments that this loan cannot be a "high-cost home loan" because the interest rate of the loan is seven percent (7.00%) per annum, and the Goetz defendants only paid one and one-half points, are also without support. A "high-cost home loan" is defined under Banking Law §6-*l*(1)(d) to mean "a home loan in which the terms of the loan exceed one or more of the thresholds as defined in paragraph (g) of this subdivision." Banking Law §6-*l*(1)(g) provides that threshold means,

> (i) For a first lien mortgage loan, the annual percentage rate of the home loan at consummation of the transaction exceeds 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 proceeding the month in which the application for the extension of credit is received by the lender... as determined by the following rules: if the terms of the home loan offer any initial or introductory period, and the annual percentage rate is less than that which will apply after the end of such initial or introductory period, *then the annual percentage rate that shall be taken into account for the purposes of this section shall be the rate which applies after the initial or introductory period*; or
> (ii) The total points and *fees* exceed: five percent of the total loan amount if the total loan amount is fifty thousand dollars or more... (emphasis added).

In the case at hand, the note provides that interest will be computed at a seven percent (7.00%) interest rate only for the initial five year term, and thereafter the rate is adjusted. Accordingly, the percentage rate that must be used herein to determine whether the loan exceeds the threshold as set forth in §6-*l*(1)(g)(i) is the rate which applies after the initial term, and not simply seven percent (7.00%) as claimed by the plaintiff. As to the plaintiff's argument that the loan does not meet the threshold under Banking Law §6-*l*(1)(g)(ii) because the Goetz defendants only paid one and one-half points to their mortgage broker, the court notes that this provision also includes "fees" of which the plaintiff has provided no information.

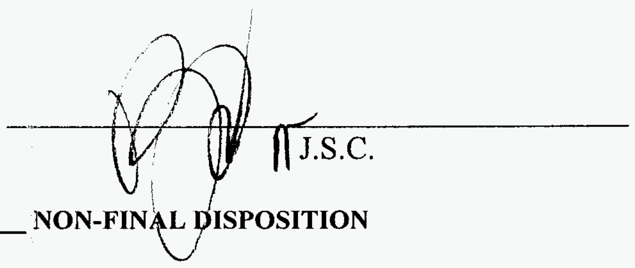
Significantly, an examination of Banking Law §6-*l*(1)(g) reveals, "whether or not a loan satisfies one of these 'thresholds'... depends upon several factors, such as interest rates, loan types, loan amounts, loan periods, periods of maturity, annual percentage rates, percentages of total points and fees, yields on treasury securities, and bona fide loan discount points. Any combination or permutation of the 'threshold'

variables set forth in ... Banking Law 6-*l*(1)(g) may cause a mortgage to meet the definition of a ...'high-cost home loan'" (***Butler Capital Corp. v Cannistra***, 26 Misc3d 598, 891 NYS2d 238, 242 [2009]). Based upon the variables and complexities of the parameters involved in defining this term (*see* ***Butler Capital Corp. v Cannistra***, *supra*), plaintiff's unsupported conclusion that the loan at issue is not a "high-cost home loan" is insufficient to establish plaintiff's prima facie burden on this summary judgment motion. In addition, the court notes that the plaintiff has failed to address the issue of whether this loan is a "subprime home loan" or a "non-traditional home loan" under RPAPL §1304. A court should not flippantly draw conclusions as to whether or not a loan at issue meets the definition of a "subprime home loan," a "high-cost home loan," or a "non-traditional home loan," particularly given the legislative intent of and protections afforded to homeowners under the statutes dealing with foreclosure actions. (*see* ***Deutsche Bank Trust Company Americas v Eisenberg***, 24 Misc3d 1205A, 890 NYS2d 368 [2009]). Therefore, as to the third affirmative defense and the issue of the RPAPL §1304 notice, the plaintiff must provide proof in evidentiary form, including an affidavit from an individual with personal knowledge, as to whether or not this matter involves the foreclosure of a "subprime home loan," a "high-cost home loan," or a "non-traditional home loan," as defined by statute (*see,* ***Deutsche Bank Trust Company Americas v Eisenberg***, *supra*).

Finally, the portion of the plaintiff's motion requesting that the court strike the Goetz defendants' first affirmative defense of failure to state a cause of action, is also denied. Since the plaintiff has failed to make a prima facie showing that this case does not involve the foreclosure of a "high-cost home loan" or a "subprime home loan," it cannot be determined whether additional allegations in the complaint are required pursuant to RPAPL §1302.

Accordingly, this motion by the plaintiff for summary judgment and related relief, is denied without prejudice and with leave to renew upon proper proof.

Dated: 3/11/10



J.S.C.

_____ **FINAL DISPOSITION** __**X**__ **NON-FINAL DISPOSITION**