

**Zwicker v Emigrant Mtge. Co., Inc.**

2010 NY Slip Op 31884(U)

July 7, 2010

Supreme Court, New York County

Docket Number: 116512/09

Judge: Eileen A. Rakower

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

**HON. EILEEN A. RAKOWER**

PRESENT: \_\_\_\_\_

PART 15

*Justice*

Index Number : 116512/2009

**ZWICKER, URSULA**

vs.

**EMIGRANT MORTNANT CO., INC.**

SEQUENCE NUMBER : 001

DEFAULT JUDGMENT

INDEX NO. 116512/09

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

MOTION SEQ. NO. 001

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

n this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1

2, 3

4, 5

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

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

**MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.**

**FILED**

JUL 14 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 7/12/10



**HON. EILEEN A. RAKOWER**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
URSULA ZWICKER,

Plaintiff,

- against -

**FILED**  
JUL 14 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Index  
No.116512/09

Mot. Seq.: 001

**DECISION/  
ORDER**

EMIGRANT MORTGAGE COMPANY, INC., BRIAN  
GOLDBERG, DEUTSCH & SCHNEIDER LLP and ADAM  
PLOTCH,

Defendants.

-----X  
HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Ursula Zwicker brings this action for rescission and vacatur of a Cooperative foreclosure sale which was held by Emigrant Mortgage Co., Inc. ("Emigrant") on October 21, 2009, against her interest in the premises known as 630 E. 14<sup>th</sup> Street, #12 in the County and State of New York. Plaintiff, among other things, seeks reinstatement of the two foreclosed mortgages. Plaintiff commenced the instant action on or about November 23, 2009. Thereafter, plaintiff served a copy of the summons and complaint upon defendant Emigrant on December 8, 2009, defendants Brian Goldberg ("Goldberg") and Deutsch & Schneider LLP ("the Deutsch firm"), the attorneys for Emigrant in the foreclosure, on December 2, 2009 (hereinafter "defendants"), and Adam Plotch ("Plotch"), purchaser of the auctioned shares in the cooperative apartment, on December 14, 2009. Plaintiff now moves for entry of a default judgment against defendants, claiming that, to date, defendants have failed to interpose an answer. Defendants cross-move to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(1) & (a)(7). Plotch files papers *pro se* in support of the cross motion to dismiss. Plaintiff opposes the cross-motion.

Plaintiff entered into a mortgage agreement with Emigrant for the cooperative apartment, dated May 31, 2006, in the amount of \$70,000<sup>1</sup> ( "Mortgage No. 1"). Plaintiff asserts that she entered into a second mortgage, dated June 20, 2007, with Emigrant, in the amount of \$75,000.00 ("Mortgage No. 2")<sup>2</sup>.

It is undisputed that Plaintiff defaulted on Mortgage #1, as of September 1, 2008. Thereafter, Emigrant began a non-judicial foreclosure proceeding by service of a Notice of Foreclosure, dated March 25, 2009. That notice was sent to plaintiff via Certified Mail, return receipt requested, and by First Class Mail. The notice was marked "Return to Sender Unclaimed Unable to Forward." On May 4, 2009, a "Notice of Foreclosure Sale of Cooperative Apartment Security" was served on plaintiff, noticing a sale to be held on June 3, 2009. That notice was also sent by Certified Mail, return receipt requested and First Class Mail. The notice of sale was signed for by plaintiff.

Defendants concede that the notice of foreclosure sale was not timely published, so the sale was rescheduled. A Notice of Rescheduled Foreclosure Sale, for a sale to be held on June 24, 2009, was served upon plaintiff via Certified Mail, return receipt requested and First Class Mail, on May 29, 2009. The notice of rescheduled sale was also published in The New York Observer on June 3, 2009, June 10, 2009 and June 17, 2009, respectively. On, or about June 8, 2009, plaintiff's counsel contacted Emigrant regarding the possibility of entering into a settlement agreement. Emigrant adjourned the foreclosure sale in order to enter into settlement negotiations. Upon its belief that an agreement had been reached, Emigrant cancelled the foreclosure sale. On June 24, 2009, a proposed stipulation was faxed to plaintiff's counsel. Plaintiff never signed the stipulation.<sup>3</sup>

Upon the failure of the parties to reach a settlement, Emigrant re-initiated

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<sup>1</sup>In her complaint, plaintiff lists this amount as \$68,804.00. However, the mortgage note lists the loan amount as \$70,000.

<sup>2</sup>Plaintiff does not submit the note for this mortgage.

<sup>3</sup>Plaintiff states in her complaint that the stipulation "contained overreaching and unconscionable terms and conditions, such as waiver of any defenses or claims against the defendants, and a commitment by the plaintiff to pay nearly \$10,000 in legal fees." Plaintiff also claims that the stipulation "did not contain a provision for plaintiff's signature and was rejected accordingly."

foreclosure proceedings by service of another Notice of Foreclosure on August 10, 2009, informing plaintiff that she was required to pay the amount past due by September 15, 2009. On September 16, 2009, Emigrant served plaintiff and her attorney with notice of sale by Certified Mail, return receipt and First Class. The sale was scheduled for October 21, 2009. Notice of the sale was published in the New York Observer on September 30, 2009, October 7, 2009, and October 14, 2009, respectively. The sale was held on October 21, 2009, as scheduled, and the property was sold to Plotch for the bid amount of \$187,000. Plaintiff attended the auction but did not bid.

Plaintiff maintains that none of the notices for this final sale were sent to her correct address. Specifically, the zip code was wrong.

Plaintiff alleges the following: As a first cause of action: that the sale was fatally defective because Emigrant, Goldberg, and the Deutsch firm failed to give notice of their intent to foreclose on Mortgage No. 2; as a second cause of action: that Goldberg and the Deutsch firm made false misrepresentations to plaintiff regarding adjournments of the foreclosure sale, as well as their intention to enter into a settlement agreement with plaintiff; as a third cause of action: that, even if the representations referred to in the second cause of action were not fraudulent, the sale should still be vacated, the mortgages reinstated, and plaintiff's costs should be paid, including attorneys fees; as a fourth cause of action: the foreclosure sale should be vacated as a matter of equity because the auction was not held in accordance with the "Uniform Commercial Code Article 9," and that the accepted bid did not represent fair value of the collateral; as a fifth cause of action, the sale should be vacated because the fair value of the collateral is "in excess of \$300,000.00" and, as such, the amount of the accepted bid does not represent fair value; and, as a sixth cause of action, that Goldberg, the Deutch firm and Plotch colluded with each other in order to secure the collateral for Plotch at a "drastically reduced and unfair rate."

Plaintiff, in support of her motion, submits the following: the pleadings; affidavits of service for personal service of the summons and complaint on defendants and Plotch; a summons and complaint from an unrelated action; a document titled "Contract of Sale-Cooperative Apartment;" and two copies of an "Affidavit of Additional Mailing." Plaintiff asserts that she properly served defendants and Plotch, that at least 90 days have elapsed since service was complete, and that defendants and Plotch have failed to answer. Thus, she argues, a default judgment should be issued

against them.

Defendants submit: a copy of the Collateral Note and Security Agreement; a Notice of Foreclosure, dated March 25, 2009, along with several proofs of mailing of the notice; a Notice of Foreclosure Sale of Cooperative Apartment Security, dated May 4, 2009; a Notice of Rescheduled Foreclosure Sale of Cooperative Apartment Security, dated May 29, 2009; correspondence between defendants and plaintiff's attorney; a Notice of Foreclosure, dated August 10, 2009, and proofs of mailing of the notice; a Notice of Foreclosure Sale of Cooperative Apartment Security, dated September 16, 2009; correspondence between defendants and plaintiff, dated October 19, 2009; a fax from plaintiff, an/or plaintiff's attorney to defendants, along with a Contract of Sale-Cooperative Apartment; several pieces of correspondence between plaintiff and defendants; a document titled "Terms of Sale;" a letter from plaintiff's attorney to defendants; a copy of a signed Stipulation to Extend Time to Answer; a fax from defendants to plaintiff's attorney, dated March 2, 2010, along with an unsigned Stipulation to Extend Time to Answer; a copy of an unsigned Stipulation of Settlement, dated March 2010, along with a "Loan Payoff Inquiry, and an accounting of fees; a fax from plaintiff's attorney to defendants, dated March 25, 2010, along with a copy of the accounting with handwritten notations; a copy of the Stipulation of Settlement, with handwritten markups; a fax of a printout of all interest charges on the outstanding loan; and a letter from plaintiff's attorney to defendants, dated April 17, 2010.

Defendant Plotch submits a separate affidavit which states:

[that he has] no relationship whatsoever-personal, professional, or otherwise-with Emigrant Mortgage Company . . . or its attorneys, other than the fact that I have attended and bid at public foreclosure auctions conducted by them . . . and have purchased properties offered for sale by them at these public auctions.

Plotch also states that after the sale was complete, he and plaintiff discussed and orally agreed to "work together to re-sell the apartment . . . [offering] to split any proceeds on a 50/50 basis." Plotch asserts that over the next few weeks he and plaintiff maintained regular contact and showed the apartment together to prospective buyers. It was not until after plaintiff retained an attorney that she stopped communicating, and brought the instant action against him.

Pursuant to CPLR 3215(a), “when a defendant has failed to appear, plead or proceed to trial of an action . . . the plaintiff may seek a default judgment against him.” The court may deny the motion upon demonstration of a reasonable excuse for defendants failure to answer. (*Guzetti v. City of New York*, 32 AD3d 234[1st Dept 2006]). Here, plaintiff agreed to extend defendants’ time to answer until March 1, 2010. Following the expiration of that extension, defendants submit evidence showing that the parties were involved in settlement negotiations up until, and even following, service of the instant motion.<sup>4</sup> Such negotiations provide a reasonable excuse for defendants’ delay in answering the complaint. (see *Haviaris v. 25 Broadway Corp.*, 93 AD2d 789[1st Dept. 1983]).

Turning now to the cross-motion, it is well settled that on a motion to dismiss under CPLR 3211(a)(7) “...the court’s task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory.” (*Ladenburg Thalmann & Co., Inc. v. Tim’s Amusements, Inc.*, 275 AD2d 243, 245[1st Dept. 2000]). While the allegations in the complaint should be liberally construed in favor of the plaintiff, dismissal is not precluded when a complaint “fails to allege any *facts* which constitute a wrong but, [rather, merely states] general conclusions . . . [such a pleading] is entirely insufficient and may be dismissed on that ground.” (*Gerdes v. Reynolds*, 281 NY 180[1939]).

A foreclosure sale must be conducted in a “commercially reasonable manner.” Such reasonableness is assessed by looking at the “totality of the record,” rather than “specific aspects” of the sale. (*DeRosa v. Chase Manhattan Mortgage Corp.*, 10 AD3d 317, 322[1st Dept. 2004]).

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<sup>4</sup>Plaintiff initially agreed to extend defendants’ time to answer for the purpose of negotiations, until March 1, 2010. Upon the expiration of the first extension, defendants requested a further extension. Plaintiff never responded to the request, but on March 25, 2010, plaintiff’s attorney responded to a proposed stipulation of settlement that was sent to him on March 19, 2010. Neither in the fax cover letter, nor in the notation on the stipulation itself, does plaintiff’s attorney indicate that settlement negotiations had ended. Further, although plaintiff filed the instant motion on April 15, 2010, her attorney continued to contact defendants regarding a possible settlement, as is evidenced by a letter dated April 17, 2010, in which plaintiff’s counsel rejects portions of the settlement agreement, and asserts a counteroffer of an amount Plaintiff was willing to pay for attorneys fees.

Even when taking the allegations in the complaint as true, as the Court must do, plaintiff's first cause of action, alleging that the foreclosure sale was "fatally defective" because defendants failed to give notice of foreclosure of the second mortgage, fails to state a cause of action. UCC §9-608(a)(1)(C), which governs the application of proceeds of collection, states, in relevant part:

(a) Application of proceeds . . . if obligation secured. If a security interest . . . secures payment . . . of an obligation, the following rules apply:

(1) A secured party shall apply or pay over for application the cash proceeds of collection or enforcement under Section 9-607 in the following order to:

(C) the satisfaction of obligations secured by any subordinate security interest in or other lien on the collateral subject to the security interest . . . under which the collection or enforcement is made . . .

Pursuant to the application of proceeds, the foreclosure sale, for which it is undisputed that plaintiff was sent notice, would have automatically extinguished Mortgage No. 2 after satisfying Mortgage No. 1. Further, the facts alleged by plaintiff are unsupported by the documents themselves. Plaintiff alleges that the foreclosure notice<sup>5</sup> "referred to only one of the mortgages and interposed the amount claimed to be due . . . with that the amounts pertaining to Mortgage No. 2." However, both the March 25, 2009 and August 10, 2009 foreclosure notices refer *only* to the May 31, 2006 mortgage agreement (Mortgage No. 1), and state solely the delinquent amount of that loan.

Plaintiff, in her second cause of action, alleges that Goldberg and the Deutsch firm made false representations "with the specific intention to prevent the plaintiff from taking legal action to prevent the foreclosure sale." In order for such a claim to withstand a motion to dismiss, plaintiff's allegations must be based on "false misrepresentation of present facts," not of mere opinion. (*Derwald v. LJM Toys, Ltd.*, 161AD2d 223[1st Dept. 1990]). In *New York Fruit Auction Corp. v. City of New*

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<sup>5</sup>Plaintiff does not specify which of the two foreclosure notices she is referring to.

York, 56 NY2d 1015[1982], the court found that:

plaintiff's allegations of fraudulent misrepresentations are fatally inadequate, among other reasons, because the alleged representations, more precatory than promissory, at best were unenforceable misrepresentations of future intent.

Goldberg and the Deutsch firm were not legally bound to cancel the foreclosure sale upon receipt of a contract of private sale. As such, even if Goldberg and the Deutsch firm did make claims that they would cancel the sale if plaintiff found a purchaser for the shares prior to the sale, there was no mandate that they do so.<sup>6</sup> Plaintiff fails to allege facts which show that defendants never intended to keep their alleged promises. (*Capricorn Investors III, L.P. v. Coolbrands International, Inc.*, 66 AD3d 409[1st Dept. 2009]). Indeed, Goldberg and Deutsch were engaged in settlement negotiations with plaintiff long before the foreclosure sale, during which they made several good faith attempts to settle the matter, including canceling a prior sale.

Regarding the third cause of action, which alleges negligent misrepresentation, plaintiff must demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information. (*J.A.O. Acquisition Corp. v. Stavitsky*, 8 NY3d 144[2007]). As to the first element, plaintiff fails to show that her relationship with Goldberg and/or the Deutsch firm was of the kind that would support a negligent misrepresentation claim. "There is no fiduciary duty arising out of the contractual arm's length debtor and creditor legal relationship between a borrower and a bank which would give rise to a cause of action for negligent misrepresentation." (*FAB Industries, Inc. v. BNY Financial Corporation*, 252 AD2d 367[1st Dept. 1998]). Not only does plaintiff lack privity with Emigrant but Goldberg and the Deutsch firm, as the legal representatives of Emigrant, are even further removed.

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<sup>6</sup>Plaintiff found such a purchaser, and her attorney faxed an executed contract of sale to the Deutsch firm half an hour prior to the scheduled sale of October 21, 2009. Defendants urge that given the last minute presentment of such contract, they had no opportunity to consult with their client prior to the sale, and thus, did not cancel the sale.

In her fourth and fifth causes of action, plaintiff challenges the \$187,000 winning bid, claiming that the bid “did not represent the fair value of the collateral.” Plaintiff bases this contention on the \$300,000 she contracted for in a private sale. “Courts have consistently declined to disturb a foreclosure sale upon a challenge to amount recovered for the collateral, except in the narrow circumstance where the price alone is so inadequate as to shock the court’s conscience.” (*DeRosa* at 322) (also see UCC 9-627[a]). The plaintiff in *DeRosa* claimed that the amount received at sale was only worth forty-five percent of the value of the property. The court found that the forty-five percent figure was unsupported and, in any event, the sale was conducted in a “commercially reasonable manner.” (*Id.* at 322). A foreclosure sale often results in prices “substantially less” than market value. (*Thornton v. Citibank, N.A.*, 226 AD2d 162 [1st Dept. 1996]). Here, the sale was 62% of the value plaintiff asserts, and is commercially reasonable.

Plaintiff alleges in her sixth cause of action, that:

Defendants . . . unlawfully colluded with one another in order to secure the subject apartment for . . . Plotch . . . at all times alleged . . . defendants had no intention whatsoever of either allowing the plaintiff to sell the apartment or to enter into a loan modification agreement . . . it was agreed upon before hand by the defendants that . . . Plotch would be able to obtain the subject apartment at a drastically reduced and unfair rate, and that defendant actively misrepresented the facts and circumstances of the foreclosure to the plaintiff, including the sending of defective notices designed not to reach her in time.

It is undisputed that defendants sent out the notices of the foreclosure sale by regular and certified mail. Even if taken as true that plaintiff never received one or more of the notices because they contained the wrong zip code,

this error would not afford a basis for setting aside the sale of the collateral . . . Moreover, cases interpreting UCC 9-504[3] have not required a secured party to conclusively establish that it provided the debtor with actual notice of foreclosure, only that the secured party took reasonable steps to provide such notice . . . by sending letters . . . by certified and regular mail.” (*Derosa* at 321).

Plaintiff fails to allege facts to support her allegation that defendants agreed before the auction that Plotch would win the bid for the apartment at a "drastically reduced price." The only irregularity in the foreclosure sale she sites to is the allegation that defendant sent "defective notices," as part of the collusive plan. Coincidentally, as Plotch points out, plaintiff served him at the same address, using the same "wrong" zip code which she asserts constituted the "defective notices."

Wherefore it is hereby

ORDERED that the motion for entry of a default judgment against defendants Emigrant Mortgage Company, Inc., Brian Goldberg, Deutsch & Schneider LLP and Adam Plotch is denied; and it is further

ORDERED that the cross-motion is granted and the complaint is dismissed in its entirety as against all defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: July 7, 2010

  
\_\_\_\_\_  
EILEEN A. RAKOWER, J.S.C.

**FILED**  
JUL 14 2010  
NEW YORK  
COUNTY CLERK'S OFFICE