SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No.: 102365/09
Motion No.: 001

AMERICAN GENERAL HOME EQUITY, INC.,

Plaintiff

against

IBRAHIM GJURA and
MARYANN GJURA

Defendants

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of the following motion to dismiss.

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Plaintiff American General Home Equity's motion to dismiss Defendants Ibrahim Gjura and Maryann Gjura's first counterclaim for predatory lending pursuant to CPLR 3211(a)(1) and (7) is granted.

Plaintiff's motion to dismiss Defendants' second counterclaim for fraud pursuant to CPLR 3211(a)(1) and (7) is granted.

Plaintiff's motion to dismiss Defendants' third counterclaim for "failure to comply with New York State Legislation recently enacted to try and save homes" pursuant to CPLR 3211(a)(1) and (7) is granted.

FACTS

On October 12, 2006, the defendants applied to the plaintiff to refinance the second mortgage

on their property located at 52 Jaffe Street, Staten Island, New York (the "Property"). Plaintiff obtained an independent appraisal from M & L Property Line Corp. ("M & L") on October 18, 2006 (the "Appraisal"), which valued to the Property at $459,000. On November 16, 2006, the plaintiff extended to the defendants a 30-year second mortgage loan in the amount of $82,207, with a fixed interest rate of 9.25% (the "Loan"). The loan from the plaintiff paid off the defendants' previous second mortgage loan, which had an interest rate of 10.95%.

Less than three years after the Loan was made, the defendants ceased making payments. In July 2009, the defendants contacted the plaintiff in an attempt to reduce their monthly payments from $705.08 to $250.00. Defendants allegedly had significant outstanding student loan and credit card debt along with sizable regular expenses to care for their disabled child. Plaintiff was unwilling to modify the Loan unless the defendants could make three consecutive monthly payments on the Loan at the current amount and show they were up to date on their first mortgage. Defendants claimed they could not meet those standards for modification. On September 24, 2009, the plaintiff filed the instant non-foreclosure lawsuit to recover sums owed by the defendants on the Loan. Defendants answered the complaint and filed three counterclaims against the plaintiff alleging: (1) Predatory Lending; (2) Fraud; and (3) "Failure to comply with New York State Legislation recently enacted to try and save homes."

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. The court will "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory".[1] In assessing a motion under CPLR 3211 (a) (7), a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated

[1] *Leon v Martinez*, 84 NY2d 83, 87-88, [1994]

one".[2] However, "bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on a motion to dismiss for failure to state a cause of action."[3]

Pursuant to CPLR 3211(a)(1), dismissal is also warranted "where documentary evidence and undisputed facts negate or dispose of claims in the complaint or conclusively establish a defense."[4]

Defendant's Counterclaims

Defendants fail to directly reference any particular statute in their initial counterclaims. However, in their opposition papers, the defendants have specified three predatory lending statutes that the plaintiff allegedly violated. These three violations comprise the defendants' First Counterclaim and they are: Banking Law § 6-L, Real Property Actions and Proceedings Law (RPAPL) § 1302, and General Business Law (GBL) § 771-a.

Defendants' Second Counterclaim alleges fraud. In Defendants' Third Counterclaim they fail to specify what statutes comprise the "New York State Legislation recently enacted to try and save homes" that the plaintiff allegedly violated. Defendants' opposition papers, apparently in an attempt to specify the statutes violated that comprise their Third Counterclaim, merely reiterates the same three statutes that comprise their First Counterclaim for predatory lending. This court will address each counterclaim in the order previously mentioned.

First Counterclaim - Predatory Lending

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[2] *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 [1977]

[3] *Parsippany Constr. Co., Inc. v. Clark Patterson Assoc., P.C.*, 2007 NY Slip Op 5709 [2d Dept 2007]

[4] *Dann v. King Assocs., LLC*, 303 A.D.2d 539 [2d Dept 2003]; *Zanett Lombardier, Ltd. v. Maslow*, 2006 NY Slip Op 4186 [1st Dept 2006]

Defendants allege that the plaintiff engaged in predatory lending by failing to take into account the defendants' ability to repay the loan. At the time, defendants were a one-wage household with substantial student loan and credit card debt as well at significant medical expenditures for their disabled child. Defendants point to three statutes that the plaintiff allegedly violated when the loan was entered into. The three statues are: Banking Law § 6-L, RPAPL § 1302, and GBL § 771-a.

Banking Law § 6-L

Banking Law § 6-l provides limitations on lenders only for those loans that qualify as "high-cost home loans." In the context of a junior-lien mortgage, a "high-cost home loan" is one whose annual percentage rate (APR) is more than 9% above the yield on U.S. Treasury securities of comparable maturity on the fifteenth day of the month immediately preceding the month in which the application for extension of credit is received by the lender.[5] Banking Law § 6-l(1)(g)(ii) delineates another way that a loan may qualify as a "high-cost home loan". Section 6-l(1)(g)(ii) states in pertinent part that a high-cost home loan is one in which "...[t]he total points and fees exceed five percent of the total loan amount...".[6]

On September 15, 2006, the yield on a 30-year U.S. Treasury security was 4.92%.[7] In order to qualify as a "high-cost home loan" under Banking Law § 6-l, the APR of defendants' loan must have been nine percentage points higher than this rate, which is 13.92%. Defendants' loan had an APR of 9.73%, which is well below the threshold for what would be considered a "high-cost home loan" at the time. Therefore, the defendant's loan does not qualify as a "high-cost home loan" under the first test.

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[5] New York Banking Law § 6-L(1)(g)(i)

[6] *LaSalle Bank, N.A., II v. Shearon*, 2009 NY Slip Op 29055, 9 (Sup. Ct., Richmond County 2009)

[7] http://www.banking.state.ny.us/legal/slir06.htm; Exhibit F, Weiss Affidavit in Support

Next, we must determine whether the total allowable points and fees paid by the borrower exceeds five percent of the total loan amount. The total loan amount was $82,207. Banking Law § 6-l(1)(h) contains a formula that calls for the loan amount to be reduced by the total allowable points and fees paid by the borrower. The resulting amount must then be multiplied by 5% to arrive at the threshold figure for determining whether the loan qualifies as a high-cost home loan.[8] The total settlement charges listed on the HUD-1 Settlement Form is $5,707.00. We must now determine the total allowable points and fees paid by the borrower by determining which fees are exempt from the threshold calculation.

The following charges from 12 CFR 226.4 are exempt in calculating the threshold requirement in high-cost home loans except in the event that "...the lender receives direct or indirect compensation in connection with the charge or the charge is paid to an affiliate of the lender...":

> (7) Real-estate fees. The following fees in a transaction secured by real property or in a residential mortgage transaction, if the fees are bona fide and reasonable in amount:
>
> (i) Fees for title examination, abstract of title, title insurance, property survey, and similar purposes.
>
> (ii) Fees for preparing loan-related documents, such as deeds, mortgages, and reconveyance or settlement documents.
>
> (iii) Notary and credit report fees.
>
> (iv) Property appraisal fees or fees for inspections to assess the value or condition of the property if the service is performed prior to closing, including fees related to pest infestation or flood hazard determinations.
>
> (v) Amounts required to be paid into escrow or trustee accounts if the amounts would not otherwise be included in the finance charge.[9]

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[8] *LaSalle*, supra

[9] 12 CFR 226.4

Included in the total settlement charge is a $1,478 recording fee. A recording fee is usually paid to a third-party on behalf of the borrower/purchaser and is thus not included in the determination of whether the finance charge exceeds 5% of the loan amount.[10] Similarly, the total settlement charge includes a title examination fee of $35.00, a title insurance fee of $344.00, and an appraisal fee of $350.00, all of which were paid to third-parties. These fees are specifically exempted by 12 CFR 226.4(7) from the calculation of whether the loan at issue is a high-cost home loan. Subtracting these fees from the total settlement charges of $5,707, we are left with $3,500, which represents the total points paid by the defendant to the lender.[11]

Using the formula under Banking Law § 6-l(1)(h), we subtract the total allowable points and fees ($3,500) from the total loan amount ($82,707) to arrive at $78,707, which is the number used in the initial calculation.[12] When we multiply $78,707 by 5% to determine whether the total allowable points and fees exceeds 5% of the loan amount, we arrive at $3,935.35.[13] Since the total allowable points and fees were $3,500, which is clearly less than $3,935.35, the defendant's loan does not qualify as a "high-cost home loan" under the second test of Banking Law § 6-l(1)(g)(ii).

As such, even affording the defendants every possible favorable inference, the documentary evidence along with the undisputed facts show that the heightened lending restrictions under Banking Law § 6-l are inapplicable to the loan at issue since the defendant's loan does not qualify as a "high-cost home loan" under either test. Therefore, the defendants' first counterclaim alleging that plaintiff engaged in predatory lending in violation of Banking Law § 6-l must be dismissed.

Real Property Actions and Proceeding Law § 1302

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[10] *Sage v. Freedom Mortg. Co.*, 704 F.2d 1519 (11th Cir. Ga. 1983)

[11] $5,707 - $1,478 - $35 - $344 - $350 = $3,500

[12] $82,707 - $3,500 = $78,707

[13] $78,707 x .05 = $3,935.35

Defendants allege that the plaintiff engaged in predatory lending and failed to comply with RPAPL § 1302 by not taking into account their allegedly debt-laden financial situation when determining their suitability to receive a loan.

Plaintiff alleges that RPAPL §1302 is inapplicable to the loan at issue because the current action is not an action to foreclose on the mortgage, and the loan is not a "high-cost home loan" or a "sub-prime home loan" as defined in Banking Law §§ 6-L and 6-M.

RPAPL § 1302 applies to actions to foreclose on high-cost or sub-prime home loans as defined in Banking Law §§ 6-L and 6-M. As discussed above, the loan at issue does not qualify as a "high-cost home loan" under Banking Law § 6-L. Therefore, the loan must qualify as a "sub-prime home loan" in order for RPAPL § 1302 to potentially apply.

A loan qualifies as a "sub-prime home loan" under New York Banking Law § 6-M if its:

> [F]ully indexed [annual percentage] rate exceeds...by more than three and three-quarters percentage points...the average commitment rate for loans in the northeast region with a comparable duration to the duration of such home loan, as published by the Federal Home Loan Mortgage Corporation (herein "Freddie Mac") in its weekly Primary Mortgage Market Survey (PMMS) posted in the week prior to the week in which the lender provides the "good faith estimate" required under 12 USC §2601 et seq.[14]

The Freddie Mac PMMS for the Northeast Region lists an interest rate of 6.33% for October 5, 2006. In order to qualify as a "sub-prime home loan", the APR on the Loan must have been greater than 10.08%. Since the defendants' APR for the Loan is 9.73%, it does not qualify as a "sub-prime home loan" under Banking Law 6-M. Therefore, the heightened notice requirements under RPAPL § 1302 is inapplicable to the defendants' Loan.

Had the defendants' Loan qualified as either a "high-cost home loan" or a "sub-prime home

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[14] New York Banking Law § 6-M(c)

loan", RPAPL § 1302 would nevertheless be inapplicable because the instant action is not one to foreclose on the mortgage. Rather, the plaintiff has elected to sue on the note rather than foreclose on the mortgage.

As the Loan is neither a "high-cost home loan" or a "subprime home loan", RPAPL § 1302 is inapplicable and the defendants' claims alleging the plaintiff engaged in predatory lending in violation of RPAPL § 1302 must be dismissed.

General Business Law § 771-a

Defendants allege that the plaintiff engaged in predatory lending in violation of General Business Law § 771-a (GBL).

Plaintiff contends that GBL § 771-a is inapplicable because the section only applies to "home improvement contractors", which the plaintiff is not.

GBL § 771-a states in relevant part:

> No home improvement contractor shall engage in any activity, transaction, or course of business or pay or receive any fee...in connection with the financing of a home improvement contract...

A "home improvement contractor" is defined by GBL § 770(5) as:

> ...a person, firm or corporation which owns or operates a home improvement business or who...agrees to perform any home improvement for a fee and for whom the total cash price of all of his home improvement contracts with all his customers exceeds one thousand five hundred dollars during any period of twelve consecutive months.

The term "home improvement" includes the repairing, remodeling, altering, converting,

or modernizing of, or adding to, residential property.[15]

Plaintiff does not qualify as a "home improvement contractor", which renders GBL § 771-a inapplicable to the current action. Plaintiff does not engage in any "home improvement" for a fee, as the term is defined in the GBL, since the extension of a second-mortgage does not fall under such a definition.

As such, viewing the facts in the light most favorable to the defendants, the plaintiff does not qualify as a "home improvement contractor". Therefore, the plaintiff is not required to abide by the heightened notice requirements under GBL § 771-a. Defendants' counterclaim alleging the plaintiff violated GBL § 771-a must be dismissed.

In defendants' opposition papers, the defendants merely reiterate the standard this court must follow when deciding a motion to dismiss. Defendants alleges no other facts, save for the bare unsubstantiated assertion that the plaintiff engaged in predatory lending in violation of several statutes, which would allow this court to determine that a cause of action for predatory lending under Banking Law § 6-L, RPAPL § 1302, or GBL § 771-a exists. Defendants attempt to bolster their argument by simply insisting that the court must accept these allegations as true. However, such allegations are not considered facts, but merely "bare legal conclusions" that are "flatly contradicted by the evidence" and thus are not presumed to be true on a motion to dismiss.[16] As such, even affording the defendants' pleadings every possible favorable inference, Banking Law § 6-L, RPAPL § 1302, and GBL § 771-a are inapplicable to the loan at issue. Therefore, defendants' First Counterclaim alleging plaintiff engaged in predatory lending must be dismissed.

Second Counterclaim - Fraud

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[15] General Business Law § 770(3)

[16] *McNeary v. Niagara Mohawk Power Corp.*, 286 A.D.2d 522 [3d dept 2001]

Defendants allege that the plaintiff engaged in fraud by arranging for an appraiser to overstate the value of the Property. Such an overstatement allegedly allowed the plaintiff to extend a second-mortgage to the defendants, even though the defendants could not afford such a mortgage.

Plaintiff asserts that the appraisal was done by an independent third-party appraiser, the defendants themselves had estimated the value of the property as close to the appraiser's value, and, even if there was wrongful conduct, the defendants have failed to specify how they were damaged by the plaintiff's approval of the second mortgage.

The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages.[17] A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (b).[18]

Although there is certainly no requirement of "unassailable proof" at the pleading stage, the complaint must "allege the basic facts to establish the elements of the cause of action." CPLR 3016 (b) is satisfied when the facts suffice to permit a "reasonable inference" of the alleged misconduct and, in certain cases, "less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud."[19]

Even with the bar thoroughly lowered for pleading fraud with requisite particularity to satisfy CPLR 3016(b), the defendants have nevertheless failed to allege facts or circumstances from which this court could reasonably conclude that fraudulent behavior occurred.

In the instant case, the alleged fraudulent assertion was the appraisal value of the Property.

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[17] *Ross v. Louise Wise Servs., Inc*., 8 NY3d 478, 488 [2007]

[18] *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 2009 NY Slip Op 4299, 4 [2009]

[19] *Pludeman v Northern Leasing Sys., Inc*., 10 NY3d 486, 890 [2008]

This appraisal was conducted by M & L, an independent third-party appraiser. Defendants have failed to allege any facts or circumstances from which it can be inferred that M & L was acting as an agent for the plaintiff. Therefore, at the outset, the defendants have failed to show that the plaintiff itself was the party that "uttered a falsehood", even if the appraisal value is presumed to have been incorrect.[20]

Defendants contend that the allegedly over-inflated appraisal constitutes a misrepresentation. The only proof that the defendants offer to establish that the appraisal was too high is the bald assertion that comparable home sales in the area of the Property show this to be true.

Representations that are substantially true will not support an action to recover damages for deceit.[21] Defendants do not offer even a single description of a home sale in the area or the price it was sold for, let alone tangible evidence of any such sales from a reputable source. This court cannot rely on defendants' self-serving, conclusory assertion to determine whether the appraisal value was untrue. As there is no evidence to the contrary, it appears that the value given by M & L was "substantially true." As such, the defendants have failed to allege that the appraisal value was false with the requisite particularity.

Defendants have also failed to show that the plaintiff knew the appraisal value was incorrect. Defendants merely assert that, because the comparable home sales allegedly show that such an appraisal was inflated, the plaintiff must have know that the appraisal was incorrect. Proof of a mere naked falsehood is not enough since the false statement must also be shown to have been uttered intentionally to deceive.[22] However, the question of fraudulent intent may be inferred under certain

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[20] *Amalfitano v. Rosenberg*, 2009 NY Slip Op 1069 [2009]; *Channel Master Corp. v. Aluminium Ltd. Sales, Inc.*, 4 N.Y.2d 403, 406 [1958]

[21] *Pappas v. Harrow Stores, Inc.*, 140 A.D.2d 501 [2d dept 1988]

[22] *Doyle v. Chatham & Phenix Nat. Bank of City of New York*, 253 N.Y. 369 [1930]

circumstances.[23]

Here, the defendants ask this court to infer that the plaintiff knew the appraisal was inaccurate simply from their assertion that comparable home sales showed the appraisal was wrong. This the court cannot do. Though the question of fraudulent intent may be inferred under certain circumstances, such inferences are typically reserved for egregious negligent misrepresentations regarding subjects which the speaker has no actual knowledge.[24] Fraud can be inferred only where facts are proven from which it results as an unavoidable inference.[25]

The defendants have not provided any comparable home sales to establish that the appraisal was incorrect, and the defendants have not alleged any facts whatsoever that would allow this court to infer that the plaintiff may have been negligent in accepting the third-party appraiser's valuation. Indeed, in their loan application documents, the defendants themselves alleged the value of the property was close to the allegedly fraudulent appraisal value. Therefore, the defendants have failed to present facts which establish that the plaintiff knew, or circumstances from which it can be inferred the plaintiff knew, that the appraisal value was inaccurate.

Defendants also claim that they justifiably relied on the appraisal in seeking to refinance their existing second mortgage on the property. Had the appraisal not been over-inflated, the defendants contend they would never have received the second mortgage from the plaintiff.

One who alleges that he or she was defrauded through a false representation has the burden of establishing that he or she relied upon it, and that such reliance was justifiable.[26] However, strong proof of reliance on a false representation is often not necessary in an action for deceit, as in many

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[23] *Purcell v. McDaniel Ford, Inc.*, 224 A.D.2d 601, 639 N.Y.S.2d 714 [2d Dept 1996]

[24] *Purcell*, supra

[25] *Altman v. Casale*, 25 A.D.2d 877 [2d Dept 1966]

[26] *Heard v. City of New York*, 82 N.Y.2d 66 [1993]

cases it can be inferred from the circumstances surrounding the transaction.[27]

Viewing the pleadings in the light most favorable to the defendants, they have established that they justifiably relied on the alleged misrepresentation. Defendants were applying to the plaintiff for a second mortgage. Presumably, a mortgage lender has greater knowledge regarding the value of property than the general public. As such, the defendants' reliance on the appraisal was justified.[28]

Lastly, the defendants contend that they have been damaged by the plaintiff's allegedly fraudulent appraisal of their property. Defendants assert that, had an accurate appraisal been conducted, they would never have been able to refinance their second mortgage. Essentially, the defendants argue that there was evidence that they could not repay the loan and the plaintiff, by over-appraising the property, lent them money they could not afford.

Even assuming that the plaintiff lent the defendants money that they could not afford to repay, the defendants have failed to establish how they were damaged by such a loan. Indeed, the defendants' monthly payments and interest rate on their original second mortgage, which was being refinanced by the loan at issue, was substantially greater than the monthly payments and interest rate offered by the plaintiff. Thus, had the alleged misrepresentation never been made, the defendants would have been in a worse position.

Viewing the pleadings in the light most favorable to the defendants, this court nevertheless fails to see how the defendants have been damaged by the plaintiff's alleged overly inflated appraisal value of the defendants' property. Therefore, the defendants' counterclaim alleging the plaintiff fraudulently over-estimated the appraised value of the property must be dismissed.

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[27] *Continental Coal Land & Timber Co. v. Kilpatrick*, 172 A.D. 541 [1st Dept 1916];

[28] *J & J Trading Co. v. Republic Nat. Bank*, 186 Misc. 2d 52, 715 N.Y.S.2d 290 [Civ. Ct. New York Cty., 2000]

Third Counterclaim - Failure to Comply with New York State Legislation Recently Enacted to Try and Save Homes

Defendants' Third Counterclaim fails to specify what statutes comprise the "New York State Legislation recently enacted to try and save homes" that the plaintiff allegedly violated. Defendants' opposition papers, apparently in an attempt to specify the allegedly violated statutes that comprise their Third Counterclaim, merely reiterates the same three statutes that comprise their First Counterclaim for predatory lending. As defendants' counterclaims for predatory lending in violation of Banking Law § 6-L, RPAPL § 1302, and GBL § 771-a have already been dismissed, and defendants do not allege any other statutes to have been violated, defendants' Third Counterclaim must be dismissed.

Accordingly, it is hereby:

ORDERED, that Plaintiff American General Home Equity's motion to dismiss Defendants Ibrahim Gjura and Maryann Gjura's first counterclaim for predatory lending pursuant to CPLR 3211(a)(1) and (7) is granted; and it is further

ORDERED, that Plaintiff's motion to dismiss Defendants' second counterclaim for fraud pursuant to CPLR 3211(a)(1) and (7) is granted; and it is further

ORDERED, that Plaintiff's motion to dismiss Defendants' third counterclaim for "failure to comply with New York State Legislation recently enacted to try and save homes" pursuant to CPLR 3211(a)(1) and (7) is granted; and it is further

ORDERED, that all parties shall appear in DCM Part 3 on Tuesday, August 31, 2010 at 9:30 a.m. for a Preliminary Conference.

ENTER,

DATED: July 16, 2010

Joseph J. Maltese
Justice of the Supreme Court

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