

Tribeca Lending Corp. v Huseinovic

2010 NY Slip Op 32846(U)

October 7, 2010

Supreme Court, Richmond County

Docket Number: 100985/08

Judge: Joseph J. Maltese

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

**Index No. 100985/08
Motion No.: 002**

TRIBECA LENDING CORP.,

Plaintiff

DECISION & ORDER

against

HON. JOSEPH J. MALTESE

**SERIF HUSEINOVIC; BAJRAM HUSEINOVIC;
FERRUH LERMI; DIGDEM LERMI; and
HEIDEIE HUSEINOVIC,**

Defendants

The following items were considered in the review of the following motion by the plaintiff for summary judgment:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Reply	-
Sur-Reply	3
Exhibits	Attached to Papers

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

The motion for summary judgment made by the plaintiff, Tribeca Lending Corp. (Tribeca), is denied in its entirety.

Facts

This is an action seeking foreclosure on a mortgage securing a loan. The defendant Serif Huseinovic (Mr. Huseinovic) previously had loans secured by two mortgages with combined balances due of \$296,141.00. The defendants, Mr. Huseinovic and Bajram Huseinovic (Ms. Huseinovic), obtained a consolidated loan secured by a mortgage agreement on September 18, 2007. The mortgage was upon real property located at 672 South Gannon Avenue, Staten Island, NY 10314. This new sub-prime loan was for \$404,950.00, and the mortgage was signed by both Mr. Huseinovic and Ms. Huseinovic. The transaction included a cash payment of \$61,986.60 to the defendants. There was no mortgage broker. The mortgage was originally recorded at the

Richmond County Clerk's Office by Mortgage Electronic Registrations Systems, Inc. (MERS), as a nominee for Tribeca, and was subsequently assigned to Tribeca. The assignment was recorded in the Richmond County Clerk's Office at Land Doc Number 256962. The defendants failed to make any of the monthly payments due on November 1, 2007 or thereafter. The plaintiff requests foreclosure on grounds of non-payment.

This initial monthly mortgage payment under the new mortgage was \$3,550.73. The defendants stated Mr. Huseinovic's sole monthly income was \$1,031.00 at the time he signed the mortgage, and that Ms. Huseinovic had no income. The defendants allegedly provided a copy of Mr. Huseinovic's social security statement to the lender. Also, the defendants state that a loan application was said to report the defendants' combined monthly income of \$8,626.00.

In an affidavit in opposition, the defendants state Tribeca never provided disclosures prior to signing. Additionally, the defendants assert they wanted to bring an attorney to the signing, but were told that they did not need to bring their own attorney, and that one would be provided for them. However, at the closing, no attorney was available to represent them. The defendants state the loan was represented as a fixed rate loan, but later discovered the loan was adjustable. The defendants state that papers were presented to be signed in rapid sequence, without an opportunity to review them, and without adequate explanation. In summary, the defendants assert they were fraudulently induced to take out this loan. Additionally, the defendants assert that the defendants attempted to perform depositions many times, but that the plaintiff did not cooperate in conducting them.

The plaintiff responds that the defendants have offered no evidence to support an allegation that the plaintiff knowingly accepted an application containing false information. If that information was false, then, the plaintiff asserts, it was Tribeca that was defrauded into making the loan.

Procedural History

The defendants were served a Notice of Intent to Foreclose on February 1, 2008. Summons and Complaint, and a Notice of Pendency, were filed by the plaintiff on March 7, 2008 in the Richmond County Clerk's Office. The occupants of the 672 South Gannon Avenue property at the time service was made on March 7, 2008, were recorded as including Ferruh Lermi, Digidem Lermi, and Heideie Huseinovic, all of whom are named in the caption. The mortgage was assigned to Tribeca by MERS on April 10, 2008 and the assignment was recorded in the Richmond County Clerk's Office on June 19, 2008. An order of reference was entered on June 3, 2008. An order to vacate the defendants' default was granted on February 25, 2009.

The plaintiff, Tribeca, moved for Summary Judgment on April, 9, 2010. In their affidavit in opposition, the defendants assert that despite many attempts to have depositions taken, and despite the court requiring depositions consequent to pretrial conferences, the plaintiff has not cooperated with fixing any times for depositions. When deposition dates were finally fixed, the depositions were postponed pending the outcome of this motion for summary judgment.

Discussion

A motion for summary judgment "permits a party to show, by affidavit or other evidence, that there is no material issue of fact to be tried and that judgment may be directed as a matter of law".¹ Notwithstanding facts presented by any party, "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact."² All evidence must be examined in the light most favorable to the non-moving party;³ and the non-movant must be given the

¹*Brill v City of New York*, 2 NY3d 648, 651 (2004)

²*Id.*

³*Nicklas v. Tedlen Realty Corp.*, 305 AD2d 385, 386 [2d Dept. 2003].

benefit of every favorable inference.⁴

In all accelerated judgments, “[t]he motion shall be granted if, upon all the papers and proof submitted, the cause of the action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of either party.”⁵ A motion for summary judgment also requires that “the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.”⁶ It is the proponent of a motion for summary judgment that has the burden of tendering sufficient evidence to show the absence of competing material issues of fact.⁷ Once a prima facie case has been established, the burden is then upon the non-movant to raise defenses,⁸ showing sufficient evidence shifts the burden to the opposite party to put forth opposing evidence in admissible form that will establish a triable issue for the fact finder.⁹ If either party raises facts sufficient to require a trial of an issue of fact accelerated judgment must be denied.¹⁰ If it appears that the only issue to be resolved is the amount of damages, such an action may go to immediate trial.¹¹

Additionally, when assessing a motion for summary judgment, “it is proper for the court to look beyond the [opponent’s] answer and deny summary judgment if facts are alleged in

⁴*Gray v. N. Y. City Transit Auth.*, 12 AD3d 638, 639 [2d Dept. 2004]; *Perez v. Exel Logistics, Inc.*, 278 AD2d 213, 214 [2d Dept. 2000]

⁵CPLR § 3212 (b); *cited in Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY 3d at 383.

⁶New York Civil Practice Law and Rules (CPLR) § 3212 (b).

⁷*Wasserman v. Carella*, 307 AD 2d 225, 226 [1st Dept 2003].

⁸*Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY 3d at 383, *and Interman Industrial Products, Ltd. v R.S.M. Electron Power, Inc.*, 37 NY 2d at 155.

⁹*Zuckerman v. City of New York*, 49 NY 2d 557, 562 [1980]; *and In the Matter of Javon T. v. Ashton T.*, 2009 NY Slip Op *1 [2d Dept 2009].

¹⁰CPLR § 3212 (b).

¹¹CPLR § 3212 (c).

opposition to the motion, which if true, constitute a meritorious defense.”¹² According to the Appellate Division, Second Department, determining the credibility of testimony is the prerogative of the finder of fact.¹³ A concurrence in the Court of Appeals confirms “[i]t is not the court’s function on a motion for summary judgment to assess credibility.”¹⁴ The concurrence continues, “[c]redibility determinations ... are jury functions, not those of a judge.”¹⁵

“[T]he party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action.”¹⁶ Here, the opposing defendants present evidence in the form of sworn testimony in opposition to the plaintiff’s motion for summary judgment. Determining the credibility of the defendants and of the plaintiff is important when evaluating whether improper representations were made to the defendants. Those representations concern the amount of monthly payments, whether the loan rate would vary or be fixed, and whether a false impression was imparted to the defendants concerning their legal representation at closing.

The plaintiff asserts that defendants are of full age, not in the armed services, and of sound mind. The defendants do not dispute or oppose these assertions.

However, in answer to the motion for summary judgment, the defendants allege in an affidavit that they were told the newly consolidated monthly mortgage payment would be the

¹²*Emigrant Mtge. Co., Inc. v Fitzpatrick*, 2010 NY Slip Op 20317, 4 [Supr. Ct. Suffolk Cty. 2010]; *Nassau Trust Co. v Montrose Concrete Products Corp.*, 56 NY 2d 175, 182 [1982].

¹³*Miller v. Long Island Lighting Co.*, 166 AD 564, 565 [2d Dept 1990]; and *Halkias v. Otolaryngology-Facial Plastic Surgery Assoc. P.C.*, 282 AD 2d 650, 651 [2d Dept 2001].

¹⁴*Forest v. Jewish Guild for the Blind*, 3 NY 3d 295, 315 [2004 Smith, J. concurring], quoting *Ferrante v. American Lung Assn.*, 90 NY 2d 623, 631 [1997].

¹⁵*Forest v. Jewish Guild for the Blind*, 3 NY 3d at 315, quoting *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 255 [1986].

¹⁶*GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY 2d at 968; quoting *Zuckerman v New York*, 49 NY 2d 557, 560 [1980].

same as previous monthly payments under the earlier two mortgages, and that they would receive additional cash. The defendants further assert that Tribeca must have been aware of the defendants' actual combined income despite the supposed loan application. Tribeca has not countered these assertions.

The defendants further state that the plaintiff should have been aware, based upon facts known to Tribeca at the time of signing, that the loan could not be paid by them. If, as the defendants assert, Tribeca was apprised of the defendants' financial circumstances the sub-prime loan should never have been granted.¹⁷ Furthermore, it was Tribeca's responsibility to "take reasonable steps to verify the accuracy and completeness of information provided by or on behalf of the borrower."¹⁸ Tribeca has not indicated the measures taken, if any, to verify the accuracy of the loan application. Therefore, it is impossible to ascertain that such measures were "reasonable" on the basis of facts supplied by Tribeca.

The face of the documents signed by the defendants do show the amount of monthly payments and show that the loan payments would be based upon an adjustable variable rate. Additionally, a "party is under an obligation to read a document before he or she signs it, and a party cannot generally avoid the effect of a [document] on the ground that he or she did not read it or know its contents."¹⁹ However, it is a venerable principle that the signing of a mortgage under conditions of fraud, duress or undue influence is a defense against that mortgage.²⁰ "Deceptive acts or practices in the conduct of any business, trade or commerce or in the

¹⁷New York Banking Law (Bank) § 6-m 4.

¹⁸Bank § 6-m 4 (b).

¹⁹*Cash v Titan Fin. Servs., Inc.*, 58 AD 3d 785, 788 [2d Dept 2009]; *quoting Martino v Kaschak*, 208 AD 2d 698 [2d Dept 1994].

²⁰*Barrett v Weber*, 125 NY 18, 24 [1890]; *Triad Distributors, Inc. v Conde*, 56 AD 2d 648 [2d Dept 1997].

furnishing of any service in this state are ... declared unlawful.²¹ Whether a signature to a loan and mortgage is improperly obtained, is a matter of fact to be determined by a fact finder.²² Here, the defendants state they were overwhelmed with the process at closing and were presented a pile of over one hundred pages for signature at one time. The defendants assert that documents were pushed forward to be signed in rapid sequence without time to evaluate them or seek adequate explanation of their import. Tribeca has not commented upon these defenses.

Both the plaintiff and the defendants assert fraudulent actions on the part of the other. The plaintiff contends that the defendants fraudulently represented resources on their loan application for the mortgage. The defendants assert that it was the plaintiff that improperly completed the loan application. In an action for fraud, the circumstances must be stated in detail.²³ Unassailable proof of fraud is not required, but sufficient detail of facts is a requirement.²⁴ Here, that detail might include the evidence of the loan application itself, but that application is not within the documents provided by either party. None the less, the defendants have particularized allegations of fraud in their assertion of the plaintiff's inaccurate verbal assurances that payments would be affordable; the plaintiff's promise that legal counsel would be provided for the defendant; and by the plaintiff's presenting papers for signature in a disconcerting rapid fire sequence. Tribeca has not disputed these assertions.

The initial burden upon the movant for summary judgment is to present the grounds for summary judgment. Having done so, the non-moving party may rebut by offering issues of fact

²¹New York General Business Law (Gen Bus) § 349 (a).

²²*Triad Distributors, Inc. v Conde*, 56 AD 2d 648, 648-649 [2d Dept 1977], *motion for leave to appeal denied Triad Dist., Inc. v Conde*, 42 NY 2d 803 [1977]; and *Fitzgerald v Rivers*, 17 AD 3d 312 [2d Dept 2005].

²³CPLR § 3016 (b); *see also Pludeman v Northern Leasing Sys., Inc.*, 10 NY 3d 486, 491 [2008].

²⁴*Pludeman v Northern Leasing Sys., Inc.*, 10 NY 3d at 491.

remaining to be resolved by a fact finder, or by demonstrating that the law does not support summary judgment. The defendants assert a defense of fraud on the basis of misrepresentation and on the basis of improperly obtaining the defendants' signatures. The defendants further assert that Tribeca did not meet its regulatory requirement of confirming the defendants' ability to repay the loan. The plaintiff has not adequately refuted these contentions. Therefore, the defendants have indeed met the challenge of coming forth with such issues of fact that will require a fact finder to determine. The motion for summary judgment made by the plaintiff, Tribeca Lending Corp., is denied.

Accordingly, it is hereby

ORDERED, that the motion made by the plaintiff, Tribeca Lending Corp., for summary judgment against the defendants, Serif Huseinovic, Bajram Huseinovic, Ferruh Lermi, Digidem Lermi, and Heideie Huseinovic, is denied in the entirety; and it is further

ORDERED, that the parties shall return to DCM Part 3, for a pre-trial conference on **Wednesday, October 27, 2010.**

ENTER,

DATED: October 7, 2010

Joseph J. Maltese
Justice of the Supreme Court