

Emigrant Mtge. Co., Inc. v Patton

2010 NY Slip Op 32994(U)

October 22, 2010

Sup Ct, NY County

Docket Number: 115045/2008

Judge: Marcy S. Friedman

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10-22-10

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

PRESENT: MARCY S. FRIEDMAN, J.S.C.

Justice

PART 57

Emergency Mortgage

INDEX NO.

115045/08

MOTION DATE

MOTION SEQ. NO.

01

MOTION CAL. NO.

- v -

Patton, J

The following papers, numbered 1 to _____ were read on this motion ~~to~~ for summary judgment

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits _____

2

Replying Affidavits _____

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

Dated: 10-22-10

MARCY S. FRIEDMAN, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

ST

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

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ X
 EMIGRANT MORTGAGE COMPANY, INC.,

Plaintiff(s),

Index No.: 115045/2008

- against -

DECISION/ORDER

JACQUELINE L. PATTON, et al.,

Defendant(s).

_____ X

In this mortgage foreclosure action, plaintiff-mortgagee Emigrant Mortgage Company, Inc. (“Emigrant”) moves to strike the answer of the mortgagor-defendants Jacqueline Patton and John Bess, and for summary judgment on its complaint against them.¹ Defendants do not dispute their default under the subject loan. Rather, defendants plead as affirmative defenses that their mortgage violated General Business Law §349 and is unconscionable.²

The following relevant facts are undisputed: In order to refinance the existing mortgage on their home at 129 West 119th Street in Manhattan, defendants obtained a mortgage from plaintiff. The subject mortgage was a “no-documentation, no-income loan,” which did not

¹ By interim order dated January 5, 2010, this court offered defendants the opportunity to request a settlement conference as provided in the recently amended CPLR 3408(a). Defendants accepted that offer, and the instant motion was held in abeyance pending either settlement or remand from the court’s Mortgage Foreclosure Part. The instant action was remanded to Part 57 on August 18, 2010.

² In light of the branch of plaintiff’s motion seeking to strike defendants’ answer, defendants’ counsel appears to treat plaintiff’s motion as one to dismiss defendants’ affirmative defenses on the face of the pleadings. However, plaintiff also moves for summary judgment for the relief sought in the complaint – namely, foreclosure of the mortgaged property. Thus, to the extent defendants assert affirmative defenses in opposition to plaintiff’s motion, they must raise a triable issue of fact on such defenses. (See Red Tulip, LLC v Neiva, 44 AD3d 204 [1st Dept 2007], lv dismissed 10 NY3d 741 [2008]; La Salle Bank Nat. Assn. v Kosarovich, 31 AD3d 904 [3d Dept 2006].)

require verification of income. The defendants first applied for a loan of \$1,250,000.00 at an interest rate of 8.875%. On March 10, 2008, the parties closed on the subject mortgage in the amount of \$1,150,000.00, at a rate of 8.25%. The interest rate on defendants' prior mortgage, which was in default, was 8.00%. At closing, the Emigrant loan was used to satisfy defendants' prior mortgage and a tax lien against defendant Bess, and to provide defendants with \$128,751.33 for their own use. Defendants made one timely payment, and defaulted on their second payment.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

General Business Law ("GBL") §349 provides a private right of action to consumers for injuries resulting from deceptive business practices. A claim brought pursuant to GBL §349 "must be predicated on a deceptive act or practice that is 'consumer oriented'." (Gajdon v Guardian Life Ins. Co. of Am., 94 NY2d 330, 344 [1999], citing Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d 20, 25 [1995].) To be consumer oriented, "conduct need not be repetitive or recurring but defendant's acts or practices must have a broad impact on consumers at large." (New York Univ. v Continental Ins. Co., 87 NY2d 308, 320 [1995]; Oswego Laborers' Local 214 Pension Fund, 85 NY2d at 25.)

Defendants primarily contend that the subject mortgage was inherently deceptive under GBL § 349 because Emigrant issued it to them without requiring a showing of defendants' income, and because it provided for a default interest rate of 18%. More particularly, defendants argue that the loan was inherently deceptive because "it concealed the consequences of the borrowers' inevitable default." This argument is without merit on the facts. (See Friedman Aff. in Opp. at ¶ 28.) Significantly, defendants do not allege that Emigrant failed to make any required disclosures under the Truth-In-Lending Law. (See 15 USC § 1601 et seq.) Rather, they contend that the Default Interest Rate Rider ("rider") hid the impact of their default. However, the rider was executed by both defendants and expressly states that "if I [borrower] am in Extended Default, as described above, the interest rate on my loan, . . . will be increased to 18% per annum without prior notice to me" until the default is cured. (See Mortgage, Ex. 1 to P.'s Motion [emphasis supplied].) The rider thus unambiguously provides that the 18% default interest applies to the entire loan, rather than merely to the amount of the default.

Nor do defendants raise a triable issue of fact on the enforceability of the default interest provision based on their bare assertion that they did not understand what they were signing. While defendants claim that they were not sophisticated parties, they were represented by Streamline Equity Mortgage Services, Inc. (Streamline), a mortgage broker of their own choosing. Both defendants reported that they owned consulting businesses and that they had joint real estate assets of 5.5 million dollars. Under these circumstances, they had "an obligation to exercise ordinary diligence in ascertaining the terms of the document [they] signed." (See Sander v J.P. Morgan Chase Home Mortgage, 56 AD3d 301, 302 [1st Dept 2008].)

Defendants also argue that "by imposing a default rate of 18 percent on a loan for which it knew the mortgagor would default, Plaintiff deliberately sidestepped the usury" law and other

statutes. (Friedman Aff. In Opp. at ¶30.) Defendants concede that the default interest rate was not usurious. Further, it is “well settled that the defense of usury does not apply where the terms of the mortgage and note impose a rate of interest in excess of the statutory maximum only after default or maturity.” (Hicki v Choice Capital Corp., 264 AD2d 710, 711 [2d Dept 1999] [internal quotation marks, ellipsis, and citations omitted].)

Defendants also fail to raise a triable issue of fact on their claim that plaintiff knew they would default. On the contrary, defendants chose to avail themselves of a no-income verification loan and they represented in the loan application that they had sufficient income, assets, and resources to meet the payment obligations on the loan. (P.’s Motion, Ex. 10.) Defendants do not dispute that the loan, given its magnitude, was not a high cost home loan. Accordingly, the provisions of Banking Law §6-1 (2)(k), requiring the lender to undertake independent verification of the borrower’s income, are not applicable. (Compare Emigrant Mtge. Co. v Fitzpatrick, 2010 NY Slip Op 20317 [Sup Ct Suffolk County 2010].)

Defendants further contend that Emigrant paid their broker Streamline a yield spread premium, and that this premium evidences that Streamline was Emigrant’s agent and was compensated for steering defendants to a loan with a higher interest rate or worse terms than those for which they qualified. (Friedman Aff. in Opp. at ¶¶ 33-36.) There is no evidence in the record to support defendants’ wholly speculative claim that Streamline was Emigrant’s agent. Rather, the documentary evidence (see P.’s Reply, Ex. A), conclusively establishes that defendants chose Streamline to act as their mortgage broker. Even assuming arguendo that Streamline was paid a yield spread premium, such a premium is not “per se illegal.” (See Shovak v Long Is. Commercial Bank, 50 AD3d 1118 [2d Dept 2008], lv dismissed & lv denied 11 NY3d 762.) The record is also devoid of evidence showing that defendants qualified for a

lower interest loan.


Defendants' claim that the mortgage is unconscionable fails for the same reasons as their GBL claim. The court has considered defendants' remaining contentions and finds them without merit. The court accordingly holds that defendants fail to raise a triable issue of fact in opposition to plaintiff's prima facie showing of entitlement to summary judgment as to liability.

It is hereby ORDERED that the motion of plaintiff Emigrant Mortgage Company, Inc. is hereby granted to the extent of awarding plaintiff Emigrant Mortgage Company, Inc. summary judgment against defendants Jacqueline Patton and John Bess as to liability; and it is further

ORDERED that, within 20 days of the date of entry of this order, plaintiff shall settle judgment and order of reference, and file same with the Motion Support Office, Orders Section (Room 119, 60 Centre St.) for review as to form prior to its submission to Part 57.

This constitutes the decision and order of the court.

Dated: New York, New York
October 22, 2010



MARCY FRIEDMAN, J.S.C.