

Emigrant Mtge. Co., Inc. v Blizzard

2011 NY Slip Op 31088(U)

April 25, 2011

Sup Ct, Richmond County

Docket Number: 101795/2007

Judge: Joseph J. Maltese

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

**Index No. 101795/2007
Motion No.: 5**

EMIGRANT MORTGAGE COMPANY, INC.

Plaintiff

against

**ANNETTE BLIZZARD, A/K/A ANNETTE PALMER;
FRANCES BOYD;
ARROW FINANCIAL SERVICES, LLC;
NYC ENVIRONMENTAL CONTROL BOARD;
“JOHN DOES 1 - 10”, said names being fictitious and
unknown to plaintiff, the persons or parties intended
being the tenants, occupants, persons or corporations,
if any, having or claiming and interest in or lien upon the
premises described in the complaint,**

Defendants

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of the following motions to dismiss counterclaims by an order to show cause; or in the alternative, to limit discovery.

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause and Affidavits Annexed	1
Answering Affidavits	2
Hearing in Chambers	3
Exhibits	Attached to Papers
Memorandum of Law	4 & 5

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

In an order to show cause, the plaintiff Emigrant Mortgage Company, Inc. (“Emigrant”) moves to dismiss the counterclaims of Annette Blizzard, a/k/a Annette Palmer (“Palmer”) and Frances Boyd. The motion is granted in part. In that same order to show cause, the plaintiff moves to limit discovery by the defendants. The motion is granted in the entirety.

Facts

The defendants are resident in a home located at 116 Crescent Avenue, Staten Island, New York 10301-1439. Beginning in March of 2006, the defendants sought to refinance the

home. The defendants' pre-existing mortgage was held by Option One Mortgage Corp. At the time the defendants sought new financing, the mortgage bore an interest rate of 12.25 percent. On May 15, 2006, Palmer signed a Uniform Residential Loan Application compiled by Apex Mortgage Corp. ("Apex"). Information for the loan application was taken by telephone. The application form specified that the borrowers did not wish to furnish information on ethnicity or race. Palmer states that a copy of her driver license was faxed to Apex.

On May 15, 2006 the defendants signed a thirty year adjustable rate mortgage with the plaintiff. The note specified an initial rate of 11.25 percent interest upon a principal of \$247,500.00. The initial monthly payment was stated to be \$2,403.88. The defendant's first missed payment was that of January 2007. Thereupon, the default interest rate increased to 18%. The defendants were offered a Home Affordable Modification (HAM) that was spurned. The defendants have remained in complete default of their loan since January 2007.

The defendants both signed an acknowledgment of having received a Notice of the Right to Cancel on May 15, 2006. A summons and complaint to begin foreclosure was served against Palmer on April 30, 2007. The complaint was amended and a supplemental summons was made by publication against Boyd on September 13, 2007. The court appointed a guardian *ad litem* for Boyd and answer was made on October 4, 2007. The answer waived rights with respect to all matters. Palmer individually appeared *pro se* on June 22, 2007, denied all material allegations made by the plaintiff, and counterclaimed for what Palmer says were to be violations of the Truth in Lending Act ("TILA")¹, including Regulation Z.²

¹15 U.S.C.S. § 1601 - 1667-f.

²12. C.F.R. § 226.

On February 8, 2008, the plaintiff moved for summary judgment, to strike all affirmative defenses and counter claims, and for default judgment. On June 2, 2008, that motion was granted and a referee was appointed. A motion was made on September 12, 2008 to confirm the referee's report and grant a judgment of foreclosure and sale. After Palmer and Boyd failed to appear, a default motion was granted on November 7, 2008.

On May 26, 2009, the defendants made a verified amended answer and put forth counterclaims based upon the Real Estate Settlement Procedures Act ("RESPA"),³ Fair Housing Act ("FHA"),⁴ and the Equal Credit Opportunity Act ("ECOA").⁵ Palmer's moved to vacate the default judgment against her individually. This motion was granted in an order of February 9, 2010. Counterclaims under TILA, Regulation Z, RESPA, FHA and ECOA were again asserted by Palmer on February 11, 2010. Palmer also counterclaimed under New York General Business Law ("GBL") § 349. On June 16, 2010, Palmer was substituted for Boyd as an Executrix.

Discussion

In an order to show cause, the plaintiff moves to dismiss the defendants' counterclaims. If dismissal is not granted, the plaintiff moves to limit discovery. The defendants have alleged discriminatory lending practices. The defendants' counterclaims are based upon alleged breaches of portions of the FHA, ECOA, TILA, Regulation Z, and RESPA. The plaintiff opposes these counterclaims.

At this time, Palmer's default order has already been vacated. The defendants now move to vacate the default judgment against Boyd. The defendants base further defenses upon alleged breaches of portions of the FHA, ECOA, TILA, Regulation Z, and RESPA. As a consequence to vacating the default judgment, Palmer requests leave to amend her complaint.

³12 U.S.C. §§ 2601 - 2617.

⁴42 U.S.C. §§ 3601 - 3631.

⁵15 U.S.C. §§ 1691 - 1691f.

The court applies relevant substantive law, but always follows New York procedural rules.

A choice of law analysis determines the statutes and rules to apply to a given action.⁶ Here, none of the parties dispute that the defendants' counterclaims may arise under the federal statutes, FHA, ECOA, TILA and Regulation Z, and under the New York GBL. New York's interest analysis determining a choice of law includes a focus upon the jurisdiction with the greatest interest in the issue being litigated, where the significant contacts lie, and whether the purpose of the law is to regulate conduct or to allocate loss.⁷ Where the purpose of the law is to regulate conduct, the law to be applied is ordinarily that of the locus of the underlying cause of the action.⁸

Preemption of state law by federal law may originate in explicit preemption, or from an actual conflict of laws, or may come about because of implied preemption.⁹ FHA, ECOA, RESPA and Regulation Z do not explicitly preempt state law. TILA explicitly preempts state law, but only with regard to disclosure of information to the public for credit card applications and solicitations and for certain mortgages.¹⁰ Neither party precisely contends there is a conflict of law. However, the parties have chosen distinct federal laws and New York laws upon which to base their substantive claims, counterclaims and arguments. Therefore, the court applies substantive federal law in this cause of action where federal law is the basis for counterclaims and defenses. Substantive New York law is applied when the parties proceed under New York State law such as the General Business Law. However, procedural federal law pertaining only to procedure is not applicable to the courts of New York.

⁶*Thomas vs. United Air Lines, Inc.*, 24 NY 2d 714, 723 [1969] (*writ of certiorari denied United Air Lines, Inc. vs. Thomas*, 396 US 991 [1969]).

⁷*Generally see the discussion in Devore vs. Pfizer, Inc.*, 58 AD 3d 158, 138 [1st Dept. 2008].

⁸*Cooney vs. Osgood Mach., Inc.*, 81 NY 2d 66, 72 [1993].

⁹*People of the State of New York vs. Applied Card Systems, Inc.*, 11 NY 3d 105, 113 [2008]; *Devore vs. Pfizer, Inc.*, 58 AD 3d at 143 - 144; *alluding to Garcia vs. Wyeth Labs.*, 385 F. 3d 961, 965 [6th Cir. 2004]; *and generally in Desiano vs. Warner-Lambert & Co.*, 467 F. 3d 85 [2d Cir. 2006].

¹⁰15 USCS § 1610 and 15 USCS § 1639

If a time limit is a procedural rule, a New York court should apply the pertinent New York procedural rule notwithstanding the choice of substantive law.¹¹ In the courts of the State of New York, the forum hearing the action determines whether a time limit is a substantive law or a procedural rule.¹² A substantive law that imposes a time limit may be termed a “statute of repose”, but a statutory time limit as a procedural rule may be termed a “statute of limitations.”¹³ A statute of repose limits the time to assert an underlying right, whereas a statute of limitations suspends an available remedy.¹⁴

Generally, a time limitation inserted into the body of a statute creating a cause of action is a statute of repose.¹⁵ Here, the time limitation contained in 15 U.S.C. § 1635 is within the body of the FHA. A statute of repose begins to run upon the accrual and occurrence of an injury.¹⁶ “If a statute creates a cause of action and attaches a time limit to its commencement, the time is an ingredient of the cause. If the cause was cognizable at common law or by other statute law, a statutory time limit is commonly taken as a statute of limitations and must be asserted by way of defense.”¹⁷ A statute of repose blocks a cause of action before it may accrue, whereas a statute of limitations, which represents a procedural rule, prevents a plaintiff from delaying an action to the strategic or tactical detriment of a potential defendant.¹⁸ Thus complying with the time limit required by a statute of repose fulfills a condition predicate to a cause of action rather than complying with a procedural process of the court system.

¹¹*Id.* at 53.

¹²*Id.* at 54.

¹³*Id.* at 56; *see also Portfolio Recovery Assoc., LLC v King*, 14 NY 3d 410, 416 [2010].

¹⁴*Tanges v Heidelberg N. Am., Inc.* 93 NY 2d 48, 54 [1999].

¹⁵ *Id.* at 55.

¹⁶*Id.* at 55.,

¹⁷*Id.* at 56; *quoting Romano v Romano*, 19 NY2d 444, 447 (1967), *overruled on other grounds by Bros. v Florence*, 95 NY2d 290, 301 [2000].

¹⁸*Tanges v Heidelberg N. Am., Inc.*, 93 NY 2d at 55-56.

“[I]n the case of any consumer credit transaction ... in which a security interest ... is or will be acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or delivery of the information or rescission forms.”¹⁹ Otherwise, as when no rescission forms are provided, “[a]n obligor’s right of rescission shall expire three years after the date of consummation of the transaction.”²⁰ Following the passage of those three years, the right of rescission is terminated without option to restore it.²¹

When a time limit is contained within the body of law, when it begins to run upon the accrual of the injury, and when it is more than a mere procedural rule, it is a statute of repose. The statutes of repose in 15 U.S.C. § 1635 are substantive law and are applicable in this court. As for other procedural rules, the court will be guided by rules such as those specified by the New York Civil Practice Law and Rules.

The defendants request the court take judicial notice of discrimination reported in the New York Times and notice of the defendants’ assertion that the majority of sub-prime loans were made in minority neighborhoods. Judicial notice may be taken of law.²² The Appellate Division, Second Department, permits a court to take judicial notice of the court’s web site.²³ This judicial notice the defendants urge upon the court is precisely that which pertains to the heart of the action. The court declines to take judicial notice of these assertions despite the defendants’ invitation.

¹⁹15 USCS § 1635 (a).

²⁰15 USCS § 1635 (f).

²¹*Beach vs. Ocwen Fed. Bank.*, 523 US 410, 413 [1998].

²²CPLR § 4511.

²³*Matter of Oak Tree Realty Co., LLC vs. Board of Assessors*, 71 AD 3d 1027, 1028 [2d Dept. 2010].

When continuing violations of a law persist, federal law may extend a time limitation to begin from the time of the last violation, allowing action against all the violations including those that would otherwise be precluded by the statute of limitations.²⁴ The defendants invoke this principle of continuing violation as a defense against the statute of limitations. The defendants also invoke equitable tolling to extend time limits. However, “[i]f Congress puts a limit upon the time for enforcing a right which it has created, there is an end to the matter.”²⁵ When there is a matter of equity based upon the law of a state, federal courts may extend the equitable limits of that state’s law.²⁶ Here, the limit is created by Congress as substantive law, and should not be extended as an application of a state’s principle of equity. The principle of equitable tolling applies to equitable rights in federal courts.²⁷ Equitable tolling may be applied to RESPA, begin from the time a fraud is discovered.²⁸ Fraudulent concealment is ground for equitable tolling.²⁹ Equitable tolling may be established when a cause of action is concealed from a plaintiff during the tolling period, when the action is commenced within the statutory time period from when the plaintiff becomes aware, and when continuing diligence is not attributable to lack of diligence.³⁰ However, time limitations are not the basis for the court’s determinations on the grounds of RESPA, ECOA, or FHA.

²⁴*See Havens Realty Corp. Vs. Coleman*, 455 US 363, 380 - 382 [1982]; *Ramirez vs. Greenpoint Mtge. Funding, Inc.*, 633 F. Supp. 2d 922, 929 - 931 [NDCA 2008]; *and Davis vs. GMAC*, 406 F. Supp. 2d 698, 704 - 705 [NDMS 2005].

²⁵*Holmberg vs. Armbrecht*, 327 US 392, 395 [1946].

²⁶*Holmberg vs. Armbrecht*, 327 US at 396.

²⁷*Atlantic City Electric Co. Vs. General Electric Co.*, 312 F 2d 236, 239 - 240 [2d Cir. 1962].

²⁸*Moll vs. U.S. Life Title Ins. Co.*, 700 F. Supp. 1284, 1288 [SDNY 1988].

²⁹*New York vs. Hendrickson Bros., Inc.*, 840 F. 2d 1065, 1083 [2d Cir. 1988].

³⁰*Council vs. Better Homes Depot, Inc.*, ____ F. Supp. 3d ____, 2006 U.S. Dist. LEXIS 57851, *27 - 29 [EDNY 2006].

Further, the defendants assert that an interest rate greater than nine percent creates a rebuttable presumption of discrimination. As a persuasive argument, it might be argued that “a mortgage granted to a minority buyer for the purchase of property in a minority area which carries an interest rate that exceeds nine percent creates a rebuttable presumption of discriminatory practice.”³¹ Here, it is not clear that the area in which the defendants’ home is located is a minority area, and it is not clear that the defendants were known to be members of a minority. Therefore, that presumption does not persuade here.

The defendants’ counterclaims based upon TILA and Regulation Z are dismissed.

“[I]n the case of any consumer credit transaction ... in which a security interest ... is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day, following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this title, whichever is later.”³² Ordinarily, in order to rescind a loan, three conditions must be met: the loan must have been consummated, Notice of Right to Cancel must have been delivered, and TILA disclosures must have been delivered.³³ However, when notices of the right to cancel and TILA disclosures have not been made, “[a]n obligor’s right of rescission shall expire three years after the date of consummation of the transaction.”³⁴

Palmer alleges she never received a “notice of Right to Cancel”. The defendants affirm that Boyd’s appointed guardian *ad litem* should have asserted this same defense on behalf of Boyd at a hearing. In light of the documentary evidence available, this defense is not available to either defendant.

³¹*M & T Mtge. Co. vs. Foy*, 20 Misc. 3d 274, 275 [Sup. Ct. Kings Cty. 2008].

³²15 USCS § 1635 (a).

³³*Weintraub vs. Quicken Loans, Inc.*, 594 F. 3d. 270, 273 [4th Cir. 2010].

³⁴15 USCS § 1635 (f).

“Either party may submit any evidence that could properly be considered on a motion for summary judgment.”³⁵ On May 15, 2006, both defendants’ signed an acknowledgment of their receipt of disclosures, including the Notice of Right to Cancel, required under TILA, 15 U.S.C. § 1601 *et seq.* The acknowledgment was attached to a previous affirmation in opposition to the defendants’ order to show cause filed February 11, 2010.³⁶ Palmer indicates she was told she could rescind her mortgage. Palmer executed a letter of rescission on June 21, 2007, less than three years from the time of the execution of her mortgage. Here, the defendants asserted in counter claims that Boyd was not provided with a Notice of Right to Cancel. Neither Palmer’s letter of rescission nor Boyd’s assertions can be reconciled with the signed document acknowledging receipt of the Notice of Right to Cancel.

The evidence represented by the receipt for a notice of the “Right to Cancel” permits the defendants’ counterclaims to be dismissed on the basis of the documentary record.³⁷ The defendants failed to exercise their right to rescind within the three days stated by law and printed on the Notice of Right to Cancel. Nor, may they rescind at a later time. Arguments to extend the time to rescind are unavailing in the face of the very documents Palmer denied existed. Consequently, neither defendant properly rescinded the mortgage. Therefore, the counterclaims based upon rescission are dismissed in the entirety.

The defendants also assert that the plaintiff failed to disclose, “[t]he maximum interest rate and payment for a \$10,000 loan originated at the initial interest rate (index value plus margin, adjusted by the amount of any discount or premium) in effect as of an identified month and year for the loan program disclosure assuming the maximum periodic increases in rates and payments under the program; and the initial interest rate and payment for that loan and a statement that the periodic payment may increase or decrease substantially depending on changes

³⁵CPLR § 3211 (c).

³⁶*See* 15 U.S.C. § 1635 (c).

³⁷CPLR § 3211 (a)(1).

in the rate.”³⁸ This disclosure “must be provided at the time an application form is provided or before the consumer pays a non-refundable fee, whichever is earlier.”³⁹

Apex provided a settlement service, defined as “any service provided in connection with a real estate settlement including ... the taking of loan applications.”⁴⁰ Apex was the first to provide application forms to the defendants. Consequently, the entity required to make the above required disclosure would be Apex, the entity that was earliest to provide a loan application form to the defendants. Therefore, the defendants’ counterclaim against the plaintiff based upon failure to comply with Regulation Z is dismissed.

The defendants have not established a *prima facie* counterclaim under the FHA.

The defendants concede a counterclaim under 42 U.S.C. § 3604 does not apply to refinancing. Otherwise, under the FHA, it is “unlawful for any person or other entity whose business includes engaging in residential real estate related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race...”⁴¹ Real estate-related transactions include “The making or purchasing of loans or providing other financial assistance ... secured by residential real estate.”⁴² Here, the defendants assert that the plaintiff engaged in predatory lending founded upon discriminatory reverse redlining. “Reverse redlining” is the situation in which a lender unlawfully discriminates by extending credit to a neighborhood or class of people (typically living in the same neighborhood) on terms less favorable than would have been extended to people

³⁸12 C.F. R. 226.19 (b)(2)(viii).

³⁹12 C.F.R. 226.19 (b); *see also* *McCutcheon vs. America’s Servicing Co.*, 560 F. 3d 143, 149 [3d Cir. 2009].

⁴⁰12 U.S.C. § 2602 (3); *see also* *Melancon vs. Countrywide Bank*, ____ F. Supp. 3d ____, 2011 U.S. Dist. LEXIS 16729, *17 FN 23 [EDLA 2011].

⁴¹42 U.S.C. § 3605 (a).

⁴²42 USCS § 3605 (b) (1) (B).

outside the particular class at issue.”⁴³ “In order to show a claim based on reverse redlining, the plaintiffs must show that the defendant’s lending practices and loan terms were ‘unfair’ and ‘predatory,’ and that the defendants either intentionally targeted on the basis of race, or that there is a disparate impact on the basis of race.”⁴⁴

Thus, there are two major prongs to a test for reverse redlining. The first is establishing an unfair or predatory loan. The second prong is discrimination. In turn, discrimination has two branches. An action based on discrimination may be based upon an intentional imposition of predatory loans imposed because of race. Or discrimination may be asserted by showing a disparate impact based on race. Therefore, an assertion of reverse redlining requires either the establishment of a neighborhood pattern of unfavorable loan terms based upon the predominant race of the neighborhood inhabitants, or individual discrimination unfavorably based upon a person’s race.

To support a counterclaim of reverse redlining, the defendants must show unfair or predatory lending. Here, the defendants counterclaim that they were deliberately targeted to have excessive loan rates applied to their mortgage. Predatory mortgages may be high interest mortgages provided to debt-ridden homeowners;⁴⁵ or may be comprised of altered loan documents.⁴⁶ “[P]redatory lending practices include exorbitant interest rates, equity stripping, acquiring property through default, repeated foreclosures, and loan servicing procedures that involve excessive fees.”⁴⁷ A determination of whether lending “practices were unfair or predatory

⁴³*Barkley vs. Olympia Mortg. Co.*, ____ F. Supp. 3d ____, 2010 U.S. Dist. LEXIS, 56-57 [EDNY 2010]; quoting *Williams vs. 2000 Homes, Inc.*, ____ F. Supp. 3d ____, 2009 US Dist. LEXIS 65433, 10 - 11 [EDNY 2009].

⁴⁴*Hargraves vs. Capital City Mortg. Corp.*, 140 F. Supp. 3d 7, 20 [D DC 2000].

⁴⁵*Drennan vs. PNC Bank, NA*, 622 F. 3d 275, 279 [3d Cir. 2010].

⁴⁶*Harris vs. Homecomings Fin. Servs.*, 377 Fed. Appx. 240, 241-242 [3d Cir. 2010].

⁴⁷*Steed vs. EverHome Mortg. Co.*, 308 Fed. Appx. 364, 369 [11th Cir. 2009]; citing *Hargraves vs. vs. Capital City Mortg. Corp.*, 140 F. Supp. 2d at 20 - 21.

is a jury question.”⁴⁸

In addition to unfair, predatory lending practices, reverse redlining requires either that victims of predatory practices be intentionally racially targeted, or that the predatory lending practices have a disparate impact imposed because of a borrower’s race. Consequently, a *prima facie* showing of reverse redlining requires the borrower through a predatory loan to be targeted on the basis of race, or alternatively, the residents in a neighborhood may be collectively targeted because of the predominant racial make up of the neighborhood. Showing either branch is sufficient to support an accusation of reverse redlining.

The defendants argue that it is not necessary to “plead facts and need not narrate events that correspond to each aspect of the applicable legal rule. Any decision declaring ‘this complaint is deficient because it does not allege X’ is a candidate for summary reversal, unless X is on the list in Fed. R. Civ. P. 9(b).”⁴⁹ Importantly, the defendants’ citations in support of this principle are discussed and applied under the Federal Rules of Civil Procedure.⁵⁰ Under the Federal Rules of Civil Procedure, specific facts are not necessary.⁵¹ However, the New York Civil Practice Law and Rules direct this court’s procedures.

The CPLR requires particularity of pleadings. Particularity of pleadings is especially detailed in a number of distinct circumstances.⁵² More generally, the “[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences,

⁴⁸*Steed vs. EverHome Mortg. Co.*, 308 Fed. Appx. at 369; citing *Hargraves vs. vs. Capital City Mortg. Corp.*, 140 F. Supp. 2d at 21.

⁴⁹*Kolupa vs. Roselle Park Dist.*, 438 F. 3d 713, 715 [7th Cir. 2006]

⁵⁰*Kolupa vs. Roselle Park Dist.*, 438 F. 3d 713, *passim*; see also *Boykin vs. Keycorp*, 521 F 3d 202, *passim* [2d Cir. 2008]; and *Barkley vs. Olympia Mortgage Co.*, _____ F. Supp. 3d _____, 2010 U.S. Dist. LEXIS 95060 *passim* [EDNY 2010].

⁵¹*Erickson vs. Pardus*, 551 US 89, 93 [2007].

⁵²CPLR § 3016.

or series of transactions and occurrences, intended to be proved and the material elements of each cause of action or defense.”⁵³ “A court may freely consider affidavits submitted by the plaintiff.”⁵⁴ Therefore, the material elements of the cause of action are required in a pleading.⁵⁵

In general, “[p]leadings shall be liberally construed [and] [d]efects shall be ignored if a substantial right of a party is not prejudiced.”⁵⁶ Here, the defects are not mere typographical errors, but are a failure to provide a material element of the counterclaims. This defect may adversely prejudice the plaintiff in its opposition to the counterclaims. In the defendants’ counterclaim, Palmer merely states that she is a black African-American woman. The defendants state that Apex was aware of Palmer’s race because Palmer faxed an image of her driver license to Apex and the license has a photograph of Palmer. The defendants do not assert that Apex was an agent of the plaintiff. Further, the defendants do not assert that the plaintiff received a subsequent copy of the driver license, nor that the plaintiff was aware of Palmer’s self-assigned racial designation. Rather, the defendants assert that Apex was in possession of the faxed driver license, and imply that the plaintiff could be presumed to be in possession as well. The defendants, as the moving party for their counterclaim, must present something other than “conclusory, self-serving statements.”⁵⁷

Palmer herself completed the application submitted to Apex. On that application, she did not indicate any racial affiliation. In an affidavit dated May 26, 2009, Palmer reported that she provided Apex with copies of pay stubs, a borrower’s certification and authorization to release

⁵³CPLR § 3013.

⁵⁴*Leon vs. Martinez*, 84 NY 2d 83, 88 [1994].

⁵⁵*Alvord & Swift vs. Stewart M. Muller Constr. Co.* 46 NY 2d 276, 284 [1978]; quoting *Spano vs. Perini Corp.*, 25 NY 2d 11, 18 [1969].

⁵⁶CPLR § 3026.

⁵⁷*Gonzalez v. Ellenberg*, ___ Misc. 3d ___, 2004 NY Slip Op 51518U, [Sup. Ct. NY, NY Cty. 2004], quoting *Estate of Nevelson v. Carro, Spanbock, Kaster & Cuiffo*, 259 AD 2d 282, 284 [1st Dept 1999].

information. Later, in an affidavit dated August 16, 2010, Palmer states that she was unaware she could supply information about her race, that an election of not designating information regarding race was imposed on her, and that not revealing her race was not her choice. In that same affidavit, Palmer stated she faxed her driver license to Apex. Palmer asserts that her race was deducible from her picture on her driver license. Palmer does not attribute the alleged knowledge Apex had of her race to Emigrant. Consequently, the defendants fail to assert that the plaintiff knew or should have known of Palmer's status as a member of a minority. Therefore, this branch of reverse redlining is not supported by proper pleading of a *prima facie* case.

“Reverse relining occurs when ‘a lender unlawfully discriminates by extending credit to a neighborhood or class of people (typically living in the same neighborhood) on terms less favorable than would have been extended to people outside the particular class at issue.’”⁵⁸ A neighborhood may be difficult to delineate. “The word ‘neighborhood’ is quite as susceptible of variation as the word ‘locality.’ Both terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles.”⁵⁹ The defendants provide an unauthenticated data table represented as originating from the Federal Financial Institutions Examination Council (“FFIEC”).⁶⁰ Data from this table is reported according to census tracts with specified patterns of population distributions. “Census tracts are small, relatively permanent statistical subdivisions of a county. Census tracts are delineated for most metropolitan areas (MA's) and other densely populated counties by local census statistical areas committees following Census Bureau guidelines (more than 3,000 census tracts have been established in 221 counties outside MA's).”⁶¹ The defendants fail to identify the neighborhood, census tract, or other

⁵⁸*Wiltshire vs. Dhanraj*, 421 F. Supp. 544, 554 [EDNY 2005]; quoting *Matthews vs. New Century Mortg. Corp.*, 185 F. Supp.2d 874, 886 [SDOH 2002], itself citing Frank Lopez, *Using the Fair Housing Act to Combat Predatory Lending*, 6 GEO. J. POV L. & POL'Y 73, 77 [1999].

⁵⁹*Connally, Commissioner, et al vs. General Constr. Co.*, 269 US 385, 395 [1926].

⁶⁰FFIEC, <http://www.ffiec.gov/cra/censusproducts.htm#censusdata> [accessed March 7, 2011].

⁶¹ U.S. Census Bureau, http://www.census.gov/geo/www/cen_tract.html [accessed March 7, 2011].

demonstrable geographic area claimed to be defined by the plaintiff's reverse redlining in the defendants' pleading. Therefore, there is inadequate particularity of pleading.

The plaintiff presents data from the United States Census Bureau that the State of New York in 2009 was composed of 17.2 percent Black American persons.⁶² In 2009, the proportion of Black Americans in the population in Richmond County was 11.1 percent.⁶³ In 2008, Black American persons comprised 24.7 percent of zip code 10301.⁶⁴

Disclosure Table 11-7 page 2 provides information regarding APR loans. The mean of the percentage points above treasury rates in census tracts,⁶⁵ where the minority population is less than 10 percent of the total, is 4.56 percent. For 10 to 19 percent minority representation, it is 4.64 percent. For 20 to 49 percent, the mean is 4.99 percent. For 50 to 79 percent the mean is 4.82 percent. And, for 80 to 100 percent the mean percentage points above treasury rates is 5.12 percent above the mean treasury rate. Based on this information there is no straight line increase of rates proportionate to increasing minority populations.

Disclosure Table 11-7 provides additional information. For APR loans the mean of the percentage points above treasury rates in census tracts are stated by the numbers of loans given and by the mean of percentage points above treasury rates for census tracts that are characterized by minority population. For 31 loans given in tracts less than 10 percent minority population, the mean loan was 4.90 percent above the treasury rate. For 79 loans in tracts of 10-19 percent

⁶²United States Census Bureau, <http://quickfacts.census.gov/qfd/states/36/36085.html>. [accessed August 27, 2010].

⁶³United States Census Bureau, <http://quickfacts.census.gov/qfd/states/36/36085.html> [accessed August 27, 2010].

⁶⁴Community Sourcebook of ZIP Code Demographics 199-B [ESRI 22nd ed 2008].

⁶⁵See Office of Management and Budget, OMB Bulletin 04-03 February 18, 2004 page 4; *further, the Census Tract Listing, MSA/MD Median Family Income Listing, Counties Located in Non-Metro Areas Listing, and Census-Geography Only applications may be accessed at FFIEC <http://www.ffiec.gov/cra/censusproducts.htm#censusdata> [accessed March 7, 2011].*

minority representation, the mean was 5.14. For 149 loans given where minorities were 20 to 49 percent, the mean was 5.23. For 70 loans where minorities were 50 to 79 percent of the population the mean loan was 5.25 percent above the mean for treasury rates. For 165 loans where minorities were 80 to 100 percent of the population, the mean loan was 5.32 percent above the mean for treasury rates.

The defendants fail to identify the census tract in which the defendants' residence lies. The defendants fail to identify the racial distribution of the residents in the census tract. The defendants' zip-code defined neighborhood has 24.7% Black Americans and 53.6% of the population is designated as white. The defendants' reasoning leaps from being themselves Black Americans, to being discriminated against because of the census tract in which they live. If allowed to manipulate data, it might be possible for the defendants to gerrymander a zone in which loan rates to Black Americans appear to support a claim of reverse redlining. Such gerrymandering would be unfairly prejudicial to the plaintiff. By not specifying the census tract or the characteristics of the census tract in which the defendants' reside, their pleading is insufficient.

Here the defendants initiated a search, sought out Apex, and began the loan application process through Apex. The defendants made the actual loan application through Apex. The defendants did not plead that the plaintiffs knew the race of the loan applicants, or plead that the census tract in which the defendants reside is discriminated against because of racial discrimination. Therefore, the defendants have failed to plead a *prima facie* cause of action for discrimination under the FHA. The defendants' counterclaim under FHA is dismissed.

The defendants' counterclaim based upon ECOA is dismissed.

The defendants have counterclaimed under ECOA. "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce

contracts.”⁶⁶ “It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction ... on the basis of race [or] color.”⁶⁷ However, the burden is upon the claimant of discrimination to “prove purposeful discrimination.”⁶⁸ Here, the defendants have failed to allege in more than a conclusory fashion that the plaintiff knew their racial identity, or that the plaintiff targeted the census tract of residence for reverse redlining. Therefore, purposeful discrimination against the defendants’ racial identity was not possible. Consequently, the defendants have failed to make a *prima facie* case of discrimination and the counterclaim of the defendants under the ECOA against the plaintiff is dismissed.

The defendants’ counterclaim under the General Business Law is dismissed.

General Business Law § 349 states “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.”⁶⁹ “In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions.”⁷⁰ “The elements of a cause of action under these statutes [General Business Law §§ 349 and 350] are that: (1) the challenged transaction was “consumer-oriented”; (2) defendant engaged in deceptive or materially misleading acts or practices; and (3) plaintiff was injured by reason of defendant's deceptive or misleading conduct.”⁷¹

⁶⁶42 U.S.C.S. 1981 (a).

⁶⁷15 U.S.C.S. 1691 (a) and (a) (1).

⁶⁸*Anderson vs. Wachovia Mortg. Corp.*, 621 F. 3d 261, 268 [3d Cir. 2010]; *quoting Patterson vs. McLean Credit Union*, 491 US 164, 186 [1989].

⁶⁹General Business Law § 349 (a).

⁷⁰General Business Law § 349 (h).

⁷¹*Denenberg vs. Rosen*, 71 AD 3d 187, 194 [1st Dept 2010]; *citing Oswego Laborers Local 214 Pension Fund vs. Marine Midland Bank, NA*, 85 NY 2d 20, 25 [1995].

Here, the defendants have failed to particularize the deceptive practices in which the plaintiff engaged. The documentary evidence shows the defendants' had disclosure from Emigrant of the loan conditions. "Where an action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail."⁷² A conclusory assertion that they were not aware of the content of the documents they signed is not sufficient to claim fraud. "[A]bsent evidence of fraud or other wrongful conduct of some other party to a contract, one who assents to a contract is conclusively presumed to know its contents."⁷³ "A party is under an obligation to read a document before signing it, and cannot generally avoid the effect of the document on the ground that he or she did not read it or know its contents."⁷⁴ Here, the defendants do not provide particularity regarding fraud and misrepresentation other than that they were misled about the contract's contents. In the absence of any particularized assertions describing fraud, misrepresentation, or other improper conduct by the plaintiff, the plaintiff's motion to dismiss the counterclaim is granted.

Boyd was properly served.

The defendants have moved to vacate the default judgment against Boyd. An excuse for a default must be both reasonable as well as accompanied by a meritorious defense against the action.⁷⁵ Boyd's reasonably excusable defaults and her meritorious defenses are essentially the same. Boyd claims a lack of jurisdiction resulting from improper service.⁷⁶ Boyd also asserts

⁷²CPRL § 3016 (b).

⁷³*Northville Industries, Corp. vs. Ft. Neck Oil Terminals Corp.*, 64 NY 2d 930 [1985].

⁷⁴*Matter of Augustine vs. BankUnited FSB*, 75 AD 3d 596, 597 [2d Dept 2010].

⁷⁵*Delgado vs. Velecela*, 56 AD 3d 515, 516 [2d Dept 2008].

⁷⁶CPLR § 5015 (a)(4).

fraud against her as a meritorious defense.⁷⁷ This latter defense invokes the General Business Law.⁷⁸

Boyd additionally asserts attorney failure as an excuse and defense for her default. At the discretion of the court, law office failure may also be “a valid and reasonable excuse” for a default.⁷⁹ However, this should not be a routine matter.⁸⁰ Nonetheless, “a reasonable excuse for a default lies within the court’s sound discretion.”⁸¹ This court does not find attorney failure in the instant action.

The defendants state that Boyd was not properly served, and that there was insufficient due diligence prior to service being made upon Boyd by publication. Among the multiple attempts to serve Boyd was an attempt at personal service to her place of residence. Anthony Ladson, an occupant at the address listed as Boyd’s residence, stated that Boyd did not reside there and that Boyd’s then current address was unknown. A mailing to Boyd’s home address was not returned but also went unacknowledged. Seeking telephone information was not helpful. The Department of Motor Vehicles was unable to provide additional information as to Boyd’s address. Richmond County surrogates court records did not show evidence of Boyd’s demise. The Board of Elections listed Boyd’s address as the same address in which her residence was denied by Ladson. In a letter to Palmer, the plaintiff solicited her help in finding Boyd. (The defendants have argued that Palmer knew where Boyd could be found, and should have been asked to provide Boyd’s address. This ignores the letter dated July 2, 2007 requesting Palmer’s assistance in locating Boyd.) A mailed attempt to Boyd’s residence in order to contact her was unavailing. Consequently, the court permitted notice by publication.

⁷⁷CPLR 5101 (a)(3).

⁷⁸General Business Law § 349.

⁷⁹*Montalvo vs. Nel Taxi Corp.*, 114 AD 2d 494, 495 [2d Dept 1985].

⁸⁰*Montalvo vs. Nel Taxi Corp.*, 114 AD 2d at 495.

⁸¹*Delgado vs. Velecela*, 56 AD 3d at 516; *see also J. P. Equipment Rental & Materials, L.L.C. vs. Fid. & Guar. Ins. Co.*, 288 AD 2d 187 [2d Dept 2001].

The defendants' assert that Boyd was resident at a nursing home when attempts to serve her were made. "Ordinarily, a patient or inmate of an institution does not gain or lose a residence or domicile, but retains the domicile he had when he entered the institution."⁸² There is no indication Boyd undertook any action, such as changing her voting address, that would manifest an intent to change her residence.⁸³ Consequently, Boyd's residence was truly at the address at which service was attempted, an address listed as hers on the mortgage forms completed in her name. This was the address at which Ladson denied was Boyd's residence. The defendants fail to explain why an occupant at Boyd's residence would disclaim Boyd's residence at Boyd's address. Based upon affidavits of three disinterested persons detailing the multiple attempts to serve Boyd, an Order of Publication was granted.

Here, due diligence was demonstrated by the multiple attempts to find and serve Boyd. The letter further states that service by publication would increase costs of foreclosure. When offered as either an excuse or as a meritorious defense in an effort to vacate a judgment, Boyd's assertion of lack of jurisdiction fails on its face.

Therefore, despite the defendants' assertion that the method of service made upon Boyd was defective, the defendants' motion to vacate the default judgment against Boyd is denied.

The plaintiff's motion to dismiss the Palmer's counterclaim under RESPA is denied.

The provisions of RESPA are not defenses. Rather, portions of the United States Code provide a private cause of action for improper kickbacks and unearned fees.⁸⁴ The defendants also counterclaim under RESPA by asserting that Emigrant provided improper fees to Apex. There has been no opposition to this counterclaim by Emigrant and the motion made by the order to show cause why counterclaims should not be dismissed is denied in this particular. However, Boyd is subject to a default judgment, and this counterclaim will go forward under Palmer alone.

⁸²*Corr vs. Westchester County Dept of Social Services*, 33 NY 2d 111, 115 [1973].

⁸³*Corr vs. Westchester County Dept of Social Services*, 33 NY 2d at 116.

⁸⁴12 U.S.C. § 2607 (d) (2) and (5).

The overly expansive disclosure requested by the defendants is denied.

“There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action.”⁸⁵ However, “[u]pon objection by a person entitled to assert the privilege, privileged matter shall not be obtainable.”⁸⁶ Among unavailable privileged materials are attorney work products.⁸⁷ Federal rules of civil procedure also allow for broad discovery.⁸⁸

Here, the defendants’ combined interrogatories and documentary demands seek the complete loan records of all loans made by the plaintiff in the year 2006. The plaintiff objected in an order to show cause and sought to limit discovery. The defendants have crafted a proposed protective order for the information sought. Among those to whom this proposed protective order would open the documents are independent outside persons that counsel may request, and outside litigation and support vendors. Thus, the defendants and their designees would be permitted wide access to use of these records.

As the plaintiff points out, all inclusive, complete disclosure of mortgage applications and records would make available social security numbers and account numbers of third party individuals. Consequently, the defendants are seeking complete records that include sensitive data and identifying characteristics that might be exploited to the detriment of mortgage loan applicants. The defendants admit they have no need for the personal data that would be laid open if the defendants’ request for complete disclosure were granted. As one of the defendants’ purposes for obtaining confidential information, the defendants state a desire to contact borrowers who have elected previously not to disclose their information of their ethnicity. Therefore, the defendants stated wish is to obtain from those same borrowers precisely that which they themselves chose not to disclose previously. If the defendants’ petition was for a rationally

⁸⁵CPLR § 3101 (a).

⁸⁶CPLR § 3101 (b).

⁸⁷CPLR § 3101 (c).

⁸⁸*Laufman vs. Oakley Bldg. & Loan, Co.*, 72 F.R.D. 116, 120 [SDOH 1976].

limited disclosure it should be considered.⁸⁹ Here, the petition is for disclosure that is unlimited, and is also highly intrusive.

"Where, as here, discovery demands are palpably improper in that they are overbroad, lack specificity, or seek irrelevant or confidential information, the appropriate remedy is to vacate the entire demand rather than to prune it"⁹⁰ Here, the defendants' disclosure demand is for all records of third party individuals who obtained mortgage loans from the plaintiff. The disclosure demand would divulge information the defendants do not need, and disclose economic identifying information of the most sensitive kind. According to the defendants' proposals, access to these records would be relatively unfettered and could be directed by the sole choice of the defendants. "[I]t is not for the courts to correct a palpably bad' discovery demand."⁹¹ Therefore, the defendants' request for essentially all documents pertaining to all mortgage loans made in 2006 is denied.. The motion in the order to show cause to limit disclosure is granted.

Accordingly, it is hereby:

ORDERED, that the motion by Emigrant Mortgage Company in their order to show cause why the counterclaims brought by the defendants Annette Palmer and Frances Boyd under the Federal Housing Act, under the Truth in Lending Act together with Regulation Z, and under the Equal Credit Opportunity Act should not be dismissed is granted; and it is further

⁸⁹*Buycks-Roberson vs. Citibank Fed. Sav. Bank*, 162 F.R.D. 338, 342 [NDIL 1995].

⁹⁰*Board of Mgrs. of the Park Regent Condominium vs. Park Regent Condominium*, 78 AD 3d 752, 753 [2d Dept 2010]; *quoting Bell vs. Cobble Hill Health Ctr., Inc.*, 22 AD 3d 620, 620 [2d Dept 2005]; *and see also Astudillo vs. St. Francis-Beacon Extended Care Facility, Inc.*, 12 AD 3d 469, 470 [2d Dept 2004]; *as well as Latture vs. Smith*, 304 AD 2d 534, 536 [2d Dept 2003].

⁹¹*Board of Mgrs. of the Park Regent Condominium vs. Park Regent Condominium*, 78 AD 3d at 753: *quoting Lopez vs. Huntington Autohaus, Ltd.*, 150 AD 2d 351, 352 [2d Dept 1989].

ORDERED, that the motion by Emigrant Mortgage Company in their order to show cause why the counterclaim brought by the defendant Annette Palmer under Real Estate Settlement Procedures Act should not be dismissed is denied; and it is further

ORDERED, that the motion by Emigrant Mortgage Company to limit discovery made in their order to show cause, is granted and further interrogatories and documentary disclosure is ordered to be halted without prejudice; and it is further

ORDERED, that the motion by the defendants Annette Palmer and Frances Boyd to vacate the default judgment against Frances Boyd is denied; and it is further

ORDERED, that the parties shall return to **Supreme Court, Richmond County, DCM Part 3 at 130 Stuyvesant Place, 3rd Floor, Staten Island, New York, at 9:30 AM on Monday, May 23, 2011.**

ENTER,

DATED: April 25, 2011

Joseph J. Maltese
Justice of the Supreme Court