

**Security Pac. Natl. Bank v Evans**

2011 NY Slip Op 31925(U)

June 27, 2011

Sup Ct, NY County

Docket Number: 22899/92

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 022899/1992

SECURITY PACIFIC NATIONAL BK

vs

EVANS, TRACIE

Sequence Number : 013

STRIKE

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion and cross motion are decided for attached

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

FILED

JUL 01 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 6/25/11

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

EMILY JANE GOODMAN, S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 17

-----X  
SECURITY PACIFIC NATIONAL BANK,

Plaintiff,

-against-

Index No.: 22899/92

TRACIE EVANS, ARNOLD LEPELSTAT, MELVYN  
GORDON, PEOPLE OF THE STATE OF NEW YORK,  
NEW YORK CITY ENVIRONMENTAL CONTROL  
BOARD, UNITED STATES OF AMERICA and  
BOARD OF MANAGERS OF GRAMERCY PLACE  
CONDOMINIUM,

**FILED**

**JUL 01 2011**

Defendants.

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
EMILY JANE GOODMAN, J.S.C.:

In this protracted action that began in 1992, Plaintiff moves for a protective order regarding discovery. Defendant Evans (Evans) cross moves for an order dismissing that request, because a good faith affidavit was not submitted with the motion. A history of this mortgage foreclosure action can be found in the Court's Decision and Order, dated January 14, 2008, which among other things, reinstated a referee's deed of sale and denied Evans' cross motion, claiming that Plaintiff breached a January 31, 2007 settlement agreement by failing to remove or correct incorrect information in Evans' credit report, which decision was modified by the Appellate Division, First Department by Decision and Order, entered May 14, 2009.

In modifying this Court's decision, the First Department was concerned with the fact that, despite Citimortgage's letters

stating that no payments were due,<sup>1</sup> issues of fact were raised because Citimortgage's counsel would allegedly not verify this information when contacted by an independent credit bureau, acting at the request of a prospective lender, or provide a number for a Citimortgage contact.<sup>2</sup> Therefore, the First Department held that "the record presents triable issues of fact as to whether Citimortgage breached the implied covenant of good

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<sup>1</sup>These letters were attached as exhibits to the Roth Affirmation In Opposition to Cross-Motion and In Support of Order to Show Cause and were considered by the Court in rendering its Decision and Order, dated January 14, 2008. One letter by Plaintiff, dated January 29, 2007, which was given to Evans' counsel, stated that Evans' mortgage account with Citimortgage should be updated to reflect that, as of April 2003, the mortgage "debt has not been in default and there are no outstanding late fees and/or charges owed thereon from such date." The second letter from Citimortgage, dated February 21, 2007, stated that "since April 2003, no payments to CitiMortgage were due nor have any late charges or arrears been assessed," and that Evans' credit report should be revised and corrected to "reflect this information," and that all payments since 2003 should be marked as "current with no lates."

<sup>2</sup>In denying the cross motion, this Court considered Evans' contention that Plaintiff's counsel, Mr Roth, was not acting in good faith, and that he failed or refused to verify the veracity of statements contained in the Citimortgage letter when he was contacted by employees of independent credit bureaus, such as CIS Information Services (which Roth denied), and the supporting by brokers' affidavits. The Court also considered the fact that a "hard money" lender, Eastern Savings Bank, indicated in its letter dated June 7, 2007, that it was prepared to schedule a closing date, but needed an updated payoff letter to do so, which undercut any demonstration that Roth's alleged statements prevented her from refinancing. However, the First Department found that these allegations raised issues of fact as to whether Plaintiff lacked good faith and whether the lack of good faith prevented Plaintiff from obtaining the benefit of the settlement agreement.

faith by failing to confirm that its letters, rather than the credit report, gave an accurate account of defendant's payment history, and whether the erroneous credit report was the cause of defendant's inability to perform her obligations under the settlement agreement...If Citimortgage indeed refused to confirm the veracity of the information contained in the letters, its actions could well have had the "effect of destroying ...the right of [defendant] to receive the fruits of the contract."

In opposition, Evans argues that the motion should be dismissed for lack of a good faith affidavit under NYCRR 202.7. That opposition is unpersuasive as the Court has attempted to have the parties work together on settlement and discovery, to no avail, and, Plaintiff's attorney maintains that he did attempt to resolve the issues with Evans' counsel. Therefore, the lack of affidavit is excused. Evans also seeks time to oppose the motion, if the motion is not dismissed, despite submitting a cross motion containing an eleven page affirmation. That request is denied.

Evans raises issues in her cross motion and reply that do not relate to the grounds for modification. This Court's Decision and Order, dated January 14, 2008, was modified only as to the issue of Evan's credit status, and was otherwise affirmed. Evans' concern that Bankers Trust closed in 1999, that she does not know what happened to her original note, and that a

satisfaction must be granted by the proper party under Paragraph 7 of the Settlement Agreement (which only applies "upon receipt of the Settlement Funds"), was not the subject of the appellate court's modification of this Court decision, nor was it even raised to this Court prior to rendering the Decision and Order, dated January 14, 2008.<sup>3</sup> Moreover, the compliance conference order dated 2/3/11 resolves the issue of production of the loan note. Plaintiff's authority to enter into the Settlement Agreement is also not proper for discovery at this late date.

Contrary to Evans' contention, the relevant time period does not include discovery prior to the date of the Settlement Agreement. The relevant time period for discovery is January 31, 2007 through no later than May 14, 2009, the date of the First Department's decision. Although Plaintiff seeks to limit discovery to the period January 31, 2007 through June 7, 2007

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<sup>3</sup>On a prior appeal, Evans argued before the Appellate Division that there was no evidence that Bankers Trust Company of California, N.A. (which succeeded to the interests of Bank of America on April 4, 1996) was the mortgage holder, nor evidence that First Nationwide Mortgage Corp. (which merged into CitiMortgage on March 1, 2003) was the proper loan servicer (see Exh 2, Rifkin Affirm In Opp). By Decision and Order, dated July 13, 2006, the Court found that Plaintiff Security Pacific (which had merged with Bank of America National Trust in 1992) had the legal capacity to sue. Evans claims that she does not dispute that First Nationwide Mortgage Corp. merged into CitiMortgage Inc., and was a servicing agent for Banker's Trust, but questions whether CitiMortgage has servicing rights for the current note holder (Fnt 4 to Worth Affirm In Opp). This issue was not raised when the Court issued its Decision and Order, dated January 14, 2008, which was modified on other grounds and otherwise affirmed.

(when Eastern Savings Bank allegedly agreed to make a mortgage loan to Evans), or, two months earlier, based on a letter from Evans' attorney, that limitation is misplaced. The First Department considered this mortgage loan, yet it was not dispositive. Further, there is no evidence before this Court as to whether Evans continued to seek refinancing even after this Court's decision, nor whether Plaintiff acted in good faith regarding any such attempts. Therefore, the relevant time period for discovery is January 31, 2007 through no later than May 14, 2009, and discovery is limited to the issues of whether "Citimortgage breached the implied covenant of good faith by failing to confirm that its letters, rather than the credit report, gave an accurate account of defendant's payment history, and whether the erroneous credit report was the cause of defendant's inability to perform her obligations under the settlement agreement."

As the Document Requests are for the most part, beyond the scope of discovery, and because certain requests are also overbroad, the Document Request, dated October 28, 2010 is quashed. Plaintiff is granted a protective order for discovery prior to January 31, 2007. Evans may issue a new Document Request, in conformity with this Decision and Order, within 10 days of receipt of a copy of this Decision and Order with Notice of Entry.

Accordingly, it is hereby

ORDERED that the motion is granted to the extent that Document Request, dated October 28, 2010 is quashed and Plaintiff is granted a protective order for discovery prior to January 31, 2007; and it is further

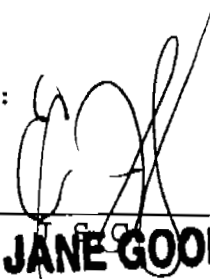
ORDERED that Evans may issue a new Document Request, in conformity with this Decision and Order, within 10 days of receipt of a copy of this Decision and Order with Notice of Entry.

ORDERED that the cross motion is denied.

This constitutes the Decision and Order of the court.

Dated: June 27, 2011

ENTER:



**EMILY JANE GOODMAN**

**FILED**

**JUL 01 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**