

Bank of Am., N.A. v Seon Yeong Kang

2011 NY Slip Op 32828(U)

October 17, 2011

Supreme Court, New York County

Docket Number: 104587/10

Judge: Joan A. Madden

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HON. JOAN A. MADDEN
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Index Number : 104587/2010

PART 11

BANK OF AMERICA

vs

KANG, SEON YEONG

INDEX NO. _____

Sequence Number : 002

MOTION DATE _____

AMEND

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 ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is determined in accordance with the annexed decision and order.

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

FILED

OCT 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: October 17, 2011


HON. JOAN A. MADDEN ^{J.S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----x
BANK OF AMERICA, N.A., as Successor by
Merger to LASALLE BANK NA as Trustee
for WAMU MORTGAGE PASS-THROUGH
CERTIFICATES SERIES 2007-OA6 TRUST,

Index No.: 104587/10

Plaintiff,
-against-

SEON YEONG KANG, CITY CONNECTIONS REALTY
INC., NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, NEW YORK CITY PARKING
VIOLATIONS BUREAU, NEW YORK CITY
TRANSIT ADJUDICATION BUREAU, NEW YORK
STATE DEPARTMENT OF TAXATION AND FINANCE,
WASHINGTON MUTUAL BANK, FA and THE
DOWNTOWN CLUB CONDOMINIUM BOARD,

FILED

OCT 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

Defendants.

-----x
JOAN A. MADDEN, J.:

Seon Yeong Kang, defendant *pro se* (defendant) moves,
pursuant to CPLR 3025 and 3120, for leave to file an amended
answer and counterclaim and a demand for the production of
documents.

BACKGROUND

This is an action to foreclose on a mortgage and note.
According to the complaint, defendant failed to tender payment
for the monthly mortgage installments that became due on October
1, 2009 and continuously thereafter.

Defendant states that his motion for leave to amend should
be granted because he has come across newly discovered
information that plaintiff lacks standing to maintain this

[* 3]

action. According to defendant, plaintiff lacks standing because: (1) it was not the original mortgage and note holder at the time that the foreclosure action was commenced; and (2) recent federal cases have had similar complaints dismissed because the plaintiffs could not provide either the original mortgage and note or an officially recorded assignment of the mortgage and note prior to instituting the foreclosure action.

The assignment of the mortgage was executed between the original mortgagee and plaintiff on February 24, 2010. Motion, Ex. 3. Defendant asserts that this assignment was recorded almost six months after the instant foreclosure proceeding was commenced. The court notes that the instant action was commenced on April 8, 2010. In addition, defendant claims that plaintiff engaged in unconscionable business practices in violation of section 349 of the New York Business Corporation Law.

In defendant's proposed amended answer, he asserts seven affirmative defenses: (1) fraud; (2) plaintiff failed to comply with the provisions of the Truth in Lending Act, 15 USC § 1601 et seq. (TILA); (3) negligence on the part of plaintiff; (4) unclean hands; (5) failure to join indispensable parties; (6) lack of standing; and (7) entire controversy doctrine. In addition, defendant asserts three counterclaims, the first based on an alleged violation of Business Corporation Law (BCL) § 349, the second based on an alleged violation of TILA, and the third

reiterating his argument regarding plaintiff's lack of standing.

In defendant's initial answer, which was served and filed late with leave of this court on consent, defendant asserted six affirmative defenses, based on alleged violations of New York Banking Law, and one counterclaim, also based on violations of New York Banking Law. The proposed amended answer no longer includes these original defenses or counterclaim.

In opposition to the instant motion, plaintiff contends that defendant's motion should be denied because the proposed answer is "grossly improper," pointing to defendant's denial that he is a resident of New York, but giving a New York residence for his address in the same pleading. Specifically, with respect to each of the proposed defenses, plaintiff argues: (1) the allegation of fraud is not pled with any specificity; (2) a violation of TILA does not affect the enforceability of the underlying contract; (3), (4) and (7), the defenses consist of one-line conclusions of law without any specific allegations; (5) the lack of standing defense is contradicted by defendant's own exhibit, since the assignment was executed approximately six weeks before the present action was commenced, and the fact that it was not recorded until after commencement of this suit is irrelevant to the validity or enforceability of the assignment; and (6) all of the foregoing indicates that plaintiff does have standing to maintain this action.

In its opposition to defendant's proposed counterclaims, plaintiff asserts that defendant failed to allege a public consumer-related wrong, which is a required element for maintaining a cause of action based on a violation of BCL § 349, that TILA is not applicable to plaintiff because it did not originate the mortgage loan, and that the lack of standing argument lacks merit for the reasons articulated above.

DISCUSSION

CPLR 3025 (b) provides that

"[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances."

As stated in *Seidman v Industrial Recycling Properties, Inc.*

(83 AD3d 1040, 1040-1041 [2d Dept 2011]):

"Leave to amend a pleading pursuant to CPLR 3025 (b) should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit, or unless prejudice or surprise to the opposing party results directly from the delay in seeking leave to amend."

Defendant's motion is granted in part and denied in part, for the reasons stated below. Each of the affirmative defenses and counterclaims asserted in the proposed amended answer will be discussed in the order presented in the proposed amendment and in accordance with defendant's arguments.

First affirmative defense: Fraud

As stated by the court in *Friedman v Anderson* (23 AD3d 163, 166 [1st Dept 2005]),

"A mere recitation of the elements of fraud is insufficient to state a cause of action" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Christopher Assoc.*, 257 AD2d 1, 9 [1st Dept 199]). Furthermore, a plaintiff seeking to recover for fraud and misrepresentation is required to set forth specific and detailed factual allegations that the defendant personally participated in, or had knowledge of any alleged fraud" (*Handel v Bruder*, 209 AD2d 282, 282-283 [1st Dept 1994]).

CPLR 3016 (b) requires that the complaint, or answer, set forth the misconduct complained of in sufficient detail to clearly inform each person alleged to have committed fraud of what their respective roles were in the alleged deception.

In the instant matter defendant's allegations of fraud are conclusory and lack sufficient particularity to satisfy the requirements of CPLR 3016 (b). Accordingly, defendant's affirmative defense of fraud is insufficient on its face.

Second affirmative defense: Violations of TILA

This defense proffered by defendant asserts that his monthly mortgage bill differs from the TILA payment schedule that he was provided by plaintiff's predecessor-in-interest. Defendant also claims that the loan was an interest-only loan, with an adjustable payment schedule.

The purpose of TILA is to ensure a meaningful disclosure of the cost of credit, and as long as there is clear disclosure of the required information, minor violations which do not cause any potential or actual harm will not be found to violate TILA. *JP Morgan Chase Bank v Tecl*, 24 AD3d 1001 (3d Dept 2005). However, TILA is a remedial statute which should be allowed a broad and liberal construction in favor of the consumer. *Community National Bank and Trust Company of New York v McClammy*, 138 AD2d 339 (2d Dept 1988).

12 CFR 226.18 sets forth the information that must be provided by the TILA disclosures, which includes, for loans such as interest-only mortgage notes, a detailed payment schedule.

Although inarticulately stated, defendant asserts a discrepancy between the amounts appearing in the TILA payment schedule and his actual monthly bills.

In opposition to this defense, plaintiff states that a claim under TILA can never constitute a defense to a lender's action on a debt, citing to *Household Consumer Discount Co. v Vespanziani* (387 A2d 93 [Pa Super 1978]), a 30-year-old Pennsylvania case that was subsequently reversed (490 Pa 209, 415 A2d 689 [1980]). However, current New York law holds that such a defense may be interposed, inasmuch as "such damages [caused by that discrepancy] might offset any damage award or deficiency judgment that might be made in favor of the plaintiff and against

[defendant]." *Delta Funding Corp. v Murdaugh*, 6 AD3d 571, 571-572 (2d Dept 2004).

At this early stage of the proceedings, the court finds that, in the interests of justice, the proper exercise of its discretion is to grant defendant's motion for leave to file an amended answer with respect to this defense.

Third affirmative defense: Negligence

Defendant's proposed defense states:

"The Plaintiff's claim is barred because any alleged loss to the Plaintiff is caused by its own negligence, or the negligence of third parties over which the Defendant has no control."

This is a one-line legal conclusion, containing no specific allegations, and is, therefore, inadequate as a matter of law. Further, no reason has been proffered as to why such a defense could not have been included in the original answer, which this court permitted defendant to file late.

Fourth affirmative defense: Unclean hands

Similarly to defendant's proposed third affirmative defense, this is a one-line statement, primarily legal boilerplate, with no factual allegations provided nor any reason given as to why this boilerplate could not have appeared in the original answer. Hence, the court declines to exercise its discretion to permit defendant, at this stage, to interpose this defense.

Fifth affirmative defense: Failure to join an indispensable party

Defendant has failed to allege who this indispensable party might be, and has offered no explanation as to why this boilerplate sentence could not have appeared in his original answer. Therefore, the court declines to exercise its discretion to permit defendant to assert this unsupported defense at this juncture.

Sixth affirmative defense: Lack of standing

This defense lacks merit, because plaintiff has made out a prima facie showing of having standing to pursue this action.

"Standing requires an inquiry into whether a litigant has 'an interest ... in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request.' Where, as here, the issue of standing is raised by a defendant, a plaintiff must prove its standing in order to be entitled to relief. In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced. As a general matter, once a promissory note is tendered to and accepted by an assignee, the mortgage passes incident to the note [internal citations omitted]."

Bank of New York v Silverberg, ___ AD3d ___, 2011 NY Slip Op 05002 *3-4 (2d Dept 2011).

"Where the plaintiff is the assignee of the mortgage and the underlying note at the time the foreclosure action was commenced, the plaintiff has standing to maintain the action [internal quotation marks and citation omitted]." *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 207 (2d Dept 2009).

In the case at bar, defendant himself has provided a copy of the assignment to plaintiff of the note and mortgage, which predates the filing of the instant action by several weeks. Hence, plaintiff has standing to maintain the present lawsuit.

Defendant's argument rests on the assumption that, in order to maintain a foreclosure action, a plaintiff need record the note and mortgage, or record the assignment of the note and mortgage, prior to commencing suit. As support for this proposition, defendant cites to *In re Foreclosure Cases* (2007 US Dist LEXIS 84011 [ND Ohio 2007]), which defendant misreads as establishing a filing requirement as a predicate to instituting a foreclosure action. In that federal case, that plaintiff, the alleged assignee of the original note and mortgage holder, was only able to produce the original note, but not the assignment. The court's reference to filing was in the context of evidentiary proof of the assignment. This is distinguishable from the case at bar, where the copy of the assignment has been produced by defendant himself.

Moreover, defendant appears to confuse recording the note and mortgage with the note and mortgage's validity and enforceability. In this, defendant is misguided.

"The plain purpose of the recording statute is to give notice to subsequent purchasers and mortgagees. Section 317 of the Real Property Law should be construed in furtherance of such

legislative intent." *Security Discount Associates, Inc. v Lynmar Homes Corp.*, 13 AD2d 389, 394 (2d Dept 1961). Recording is only evidence of the passing of title, not the passing of title itself, which must predate the recording, and only serves as constructive notice to future purchasers of another's interest in the property. *Bank of New York v Resles*, 78 AD3d 469 (1st Dept 2010).

Furthermore, whereas federal cases, such as those relied upon by defendant, may be persuasive, they are neither controlling nor binding on a state court.

Based on the foregoing, it is concluded that plaintiff has standing to maintain this action, and this affirmative defense of defendant's is deemed to be without merit.

Seventh affirmative defense: Entire controversy doctrine

The entire controversy doctrine is a legal concept under New Jersey law, and is inapplicable to the instant action concerning foreclosure of a mortgage on property located in the state of New York. See *Seung-Min Oh v Gelco Corp.*, 257 AD2d 385 (1st Dept 1999); *Tammera v Folger*, 198 AD2d 34 (1st Dept 1993).

First counterclaim: Violation of BCL § 349

"The threshold under section 349 requires allegations that the defendants' practices have a broad impact on consumers at large. [C]learly not cognizable under the statute are large, private, single-shot contractual transactions. Section 349 was intended [as] a consumer protection statute, so [p]rivate transactions without ramifications for the public at large are not the proper subject of

[such] a claim [internal quotation marks and citations omitted]."

Green Harbour Homeowners' Association, Inc. v G.H. Development and Construction, Inc., 307 AD2d 465, 468-469 (3d Dept 2003).

In the instant action, defendant has failed to allege "a unique set of circumstances whose remedy is not already available to the Attorney-General [internal quotation marks and citation omitted]." *Thompson v Parkchester Apartments Co.*, 271 AD2d 311, 311 (1st Dept 2000). Because defendant has only alleged individual injury, based on the particular circumstances of his own transaction, a cause of action premised on General Business Law § 349 cannot be maintained.

Second counterclaim: Damages based on a violation of TILA

In his proposed amended answer, defendant states that, at the time of the loan, plaintiff's predecessor-in-interest provided him with the TILA statement with the payment schedule. Defendant's counterclaim is based on the allegation that his monthly bill "does not follow the payment schedule provide in the final Truth in Lending Statement."

As stated above, a counterclaim based on an alleged violation of TILA may be asserted to offset any damages award of deficiency judgment to which plaintiff may be entitled. *Delta Funding Corp. v Murdaugh*, 6 AD3d 571, *supra*; see also *Public Loan Company v Hyde*, 47 NY2d 182 (1979). Therefore, the court finds

that this counterclaim has sufficient merit to allow defendant to amend his answer.

Third counterclaim: Lack of standing

This counterclaim is deemed to be without merit for the reasons enunciated above with respect to the sixth affirmative defense.

Lastly, defendant's document demands are inappropriately included in the instant motion, and need not be addressed by the court at this time.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendant's motion for leave to file and serve an amended answer is granted, in part, as follows: leave is granted to amend the answer to include the second affirmative defense and the second counterclaim, and to this extent the amended answer in the form annexed to the moving papers shall be deemed served and filed upon service of a copy of this order with notice of entry; and it is further

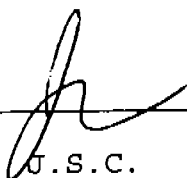
ORDERED that leave to amend the answer is denied with respect to the first, third, fourth, fifth, sixth and seventh affirmative defenses and the first and third counterclaims; and it is further

ORDERED that defendant shall serve and file an amended answer in compliance with the foregoing; and it is further

ORDERED that the parties are directed to appear for a preliminary conference in Part 11, Room 315, 60 Centre Street, on November 17, 2011, at 9:30 a.m.

DATED: October 17, 2011

ENTER:



J.S.C.
HON. JOAN A. MADDEN
J.S.C.

FILED

OCT 25 2011

NEW YORK
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