

<b>Tortora v Suntrust Mtge, Inc.,</b>
2011 NY Slip Op 33342(U)
October 21, 2011
Supreme Court, Richmond County
Docket Number: 104440/2008
Judge: Philip G. Minardo
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF RICHMOND

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NICHOLAS A. TORTORA and BONNIE  
 TORTORA,

Plaintiff(s),

-against-

SUNTRUST MORTGAGE, INC.,

Defendant(s).

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DCM PART 6

HON. PHILIP G. MINARDO

DECISION AND ORDER

Index No.: 104440/2008

Motion No. 733-001

The following papers numbered 1 to 5 were fully submitted on the 30th day of June, 2011.

	Papers Numbered
Defendants' Notice of Motion for Summary Judgment, dated March 23, 2011, with Exhibits _____	1
Defendants' Memorandum of Law, dated March 23, 2011 _____	2
Plaintiff's Affidavit in Opposition, dated May 21, 2011, with Exhibits _____	3
Plaintiff's Memorandum of Law, dated May 21, 2011 _____	4
Defendants' Reply Memorandum of Law, dated June 28, 2011 _____	5

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The motion by defendant SUNTRUST MORTGAGE, INC. for summary judgment, pursuant to CPLR 3212, to dismiss plaintiffs' complaint is granted.

On November 6, 2006, plaintiffs NICHOLAS A. TORTORA and BONNIE TORTORA (hereinafter "Plaintiffs") and defendant SUNTRUST MORTGAGE, INC. (hereinafter "SUNTRUST") entered into an agreement to refinance the existing mortgage on plaintiffs' residence. Plaintiffs were not represented by counsel at the closing. Sometime after the closing (and

beyond the three day right of rescission as provided in the “Notice of Right to Cancel”), plaintiffs allegedly discovered that the terms of the loan were different than what had been previously represented to them by SUNTRUST. In response to these alleged discrepancies, the parties agreed to enter into a second refinance.

The second refinance took place on July 16, 2007. On this occasion, plaintiffs were represented by an attorney. The documents that were executed by plaintiffs at this closing included an Interest-Only Adjustable Rate Note; Fixed/Adjustable Rate Rider; Mortgage; Consolidation, Extension, and Modification Agreement; Notice of Right to Cancel; and Truth in Lending Disclosure Statement. As consideration for the apparent errors related to the initial refinance, SUNTRUST paid a portion of plaintiffs’ closing costs.

Plaintiffs causes of action are grounded in allegations that there were “fraudulent misrepresentations” by a loan officer employed by SUNTRUST with regard to both transactions; that SUNTRUST breached the Commitment Agreement that was provided to plaintiffs prior to the July 16, 2007 closing; and that SUNTRUST and/or its agent were negligent.

SUNTRUST moves to dismiss plaintiffs’ complaint by primarily relying on clauses found in the Consolidation, Extension, and Modification Agreement and Truth in Lending Disclosure Statement which were signed by plaintiffs at the second closing.

Specifically, the Consolidation, Extension, and Modification Agreement provides, as follows:

## II. AGREEMENT TO COMBINE NOTES AND MORTGAGES

(A) By signing this Agreement, Lender and I are combining into one set of rights and obligations all of the promises and agreements stated in the Notes and Mortgages including any

earlier agreements which combined, modified, or extended rights and obligations under any of the Notes and Mortgages. This means that all of Lender's rights in the Property are combined so that under the Law Lender has one mortgage and I have one loan obligation which I will pay as provided in this Agreement. This combining of notes and mortgages is know as a "Consolidation".

\* \* \* \* \*

V. NO SET-OFF, DEFENSES

I agree that I have no right of set-off or counterclaim, or any defenses or any defense to the obligations of the Consolidated Note or the Consolidated Mortgage.

\* \* \* \* \*

VII. WRITTEN TERMINATION OR CHANGE OF THIS AGREEMENT

This Agreement may not be terminated, changed, or amended except by a written agreement signed by the party whose rights or obligations are being changed by that agreement.

In addition, the Truth in Lending and Disclosure Statement reflects that the second loan contained a **variable rate** feature and plaintiffs again received, but did not exercise, their right to rescind the loan as provided in the "Notice of Right to Cancel".

Plaintiffs claim that they received a Commitment Letter from SUNTRUST prior to the second closing which indicated they were to receive a 30 year fixed rate mortgage. However, plaintiffs claim that they were "blind-sided" at the second closing and signed the aforementioned documents for the adjustable rate loan because they were concerned that they would "lose the loan" if they did not close. Again, plaintiffs expected SUNTRUST to ultimately "acknowledge their mistake and rectify same".

Most importantly, plaintiffs aver that “this litigation was never about the Second Closing” but rather solely related to the misrepresentations/negligence of SUNTRUST with regard to the first closing and the alleged breach of the Commitment Letter associated with the second closing.

The “proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant has satisfied this burden, “the burden shifts to the [opponent] to lay bare his or her proof and demonstrate the existence of a triable issue of fact” *Chance v. Felder*, 33 AD3d 645, 645-646 [2006]).

It is clear that any and all of plaintiffs’ claims with regard to the first mortgage were extinguished by plaintiffs’ execution of the second Consolidation, Extension, and Modification Agreement. As set forth above, the second agreement obligates plaintiffs to waive any right of set-off or counterclaim that they may have had against SUNTRUST. Plaintiffs were represented by counsel at the second closing and could have elected to not close or exercise their right of rescission in order to preserve their rights. The application of the statute of frauds and/or the parol evidence rule eliminates any assertions by plaintiffs that they preserved any claims against SUNTRUST related to the first closing (*Eastern Savings Bank, FSB v. Sassouni*, 68 AD3d 917 [2009]).

Plaintiff NICHOLAS A. TORTORA, a licensed and experienced real estate agent, was not compelled to refinance a second time with SUNTRUST particularly in light of the issues that may have occurred during the first occasion. Certainly, plaintiffs could have obtained comparative offers from other lending institutions to determine whether they should have proceeded with the second loan. Plaintiffs have also failed to establish that they were under sufficient economic duress that

caused them to sign the closing documents at the second closing (*cf.*, *Leben v. Nassau Savings and Loan Association*, 40 AD2d 830 [1972]). It is therefore,

ORDERED that the motion by defendant SUNTRUST MORTGAGE, INC. for summary judgment, pursuant to CPLR 3212, to dismiss plaintiffs' complaint is granted.

This shall constitute the decision and order of the court.

ENTER

Dated: October 21, 2011

/s/ Philip G. Minardo  
J. S. C.