

Exeter Holding, Ltd. v Columbia Tit. & Abstract Corp.

2011 NY Slip Op 34177(U)

March 23, 2011

Sup Ct, Nassau County

Docket Number: 004584-10

Judge: Arthur M. Diamond

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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EXETER HOLDING, LTD.,

Plaintiff,

-against-

**COLUMBIA TITLE AND ABSTRACT CORP., UNITED
GENERAL TITLE INSURANCE COMPANY, FIRST
AMERICAN TITLE INSURANCE COMPANY, STATE
BANK OF LONG ISLAND, "John Doe" and "Jane Doe"
Individuals and/or Entities being fictitiously named,
Defendants.**

-----x

**TRIAL PART: 14
NASSAU COUNTY**

INDEX NO: 004584-10

MOTION SEQ. NO:2

SUBMIT DATE:02/14/11

The following papers having been read on this motion:

- Notice of Motion.....1**
- Memorandum of Support.....2**
- Opposition.....3**
- Memorandum in Opposition.....4**
- Reply.....5**
- Memorandum in Support.....6**
- Sur-Reply.....7**

Defendants have moved pursuant to CPLR §3211 (a) (1) for a dismissal of the complaint based upon documentary evidence claiming that the two loans made by plaintiff to Azeem Ali on August 3, 2006 were usurious and therefore plaintiff is precluded from recovery of damages under the title insurance policies issued by defendants United General Title Insurance Company, and First American Title Insurance Company.

Plaintiff, Exeter Holding Ltd., was a licensed mortgage broker from 1986 to 2010 in the business of making residential mortgage loans to individuals and entities. The aggregate amount of the residential mortgage loans made by plaintiff in 2006 exceeded the sum of one million dollars. On August 3, 2006, plaintiff made two (2) residential construction loans to Azeem Ali, the borrower, each loan secured by a consolidated mortgage in the original principal sum of \$435,000 which consisted of a loan in the amount of \$210,000 and in the sum of \$225,000, consolidated to form a

[* 2]

single first position lien in the principal sum of \$435,000. The real properties located at 22-88 Nameoke Avenue, Far Rockaway, New York (parcel 1; loan #EX-5280) and 22-84 Nameoke Avenue, Far Rockaway, New York (parcel 2; loan # EX-5281) were mortgaged by the borrower with plaintiff as mortgagee to secure the plaintiff's loans. At the closing on August 3, 2006, defendants United General Title Insurance Company, and First American Title Insurance Company issued loan policies of title insurance to plaintiff (Notice of Motion, Exhibit E, F) insuring plaintiff that it was the only lien holder on the property. Plaintiff dispersed the loan proceeds on loan no. EX-5280 and on loan EX-5281 in accordance with a loan reconciliation spread sheet. (Opposition, Exhibit B). Prior to the disbursements, plaintiff requested co-defendant Columbia Title and Abstract Corp. to provide a continuing search of title to insure that plaintiff's mortgages were not impaired by any liens or encumbrances. Defendant Columbia represented in each continuation searches that plaintiff insured first lien position had not been impaired. Azeem Ali defaulted in making certain payments and interest which led to plaintiff to order a foreclosure search. Upon the search, plaintiff discovered that defendants United General Title Insurance Company, and First American Title Insurance Company never recorded the Exeter mortgages and consequently the mortgages were not liens against the property. Further, Mr Ali had remortgaged parcels 1 and 2 and plaintiff did not have a single first priority lien. Plaintiff filed a claim with defendants on or about December 16, 2008 which was denied by defendants on August 27, 2010. Plaintiff commenced this action to recover damages under the title insurance policies issued by defendants.

Defendants originally moved to dismiss the complaint pursuant to CPLR §3211 (a) (1) claiming that the loans were usurious because the interest rate on the loans were 24% which exceeded the amount of 16% allowed by New York State Law. (GOL §5-501; §5-511). Therefore, according to defendants, the invalidity of the loans because of the usury laws precluded recovery under the title insurance policies. In opposition, plaintiff states that the plaintiff is federally exempted from the New York State Usury Statutes Under the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), 12 USCA §1735f-7a; Housing Community Development Act of 1974 807(a), 12 USCA §1735f-5b, opted-in by New York McKinney's Banking Law §14-a(1), which exempts residential first mortgage loans issued by a mortgage broker totaling more than one million dollars a year. Plaintiff Exeter was in the business of making residential loans

which loans were issued in the aggregate amount of one million dollars during the relevant period time of 2006. In reply, defendants raise for the first time that the plaintiff has not established that the mortgage loans to the borrower were first liens on the subject properties in order to obtain preemption of New York usury law. Defendants contend that plaintiff's liens were in fact liens junior to the existing Lehman Mortgages that were not cleared or otherwise disposed of at the time of the closing. Plaintiff voluntarily accepted its junior status.

Plaintiff's response in its sur-reply, (which the court has accepted as a proper use of a sur-reply), is that the existence of the Lehman mortgages recorded prior to the Exeter mortgages that defendants never recorded, is only additional evidence that co-defendant Columbia Title and Abstract was negligent in its title search attendant to the issuance of the title insurance policies. Plaintiff further references the title insurance policies themselves (Notice of Motion, Exhibit E, F) attached to defendants moving papers which insure plaintiff's mortgages in the first position against the two real estate parcels and not subject or subordinate to any other liens against the mortgaged premises. Finally, plaintiff references the New York General Obligation Law §5-501 (6)(a) which provides that the usury law does not apply to loans in the amount of "\$250,000 or more not secured primarily by an interest in real property improved by a one or two family residence." Finally, a New York licensed mortgage banker may make junior mortgage loans to individual borrowers at whatever rate is "agreed to by the lender and the borrower." (New York Banking Law §591-a[1]).

A motion to dismiss upon documentary evidence pursuant to CPLR §3211 (a) (1) requires a showing of documentary evidence that resolves all factual issues as a matter of law and definitively disposes of plaintiff's claim. [*Unadilla Silo Company, Inc. V. Ernst & Young et. al.*, 234 AD2d 754; *Ozdemin v. Caithness Corp.*, 285 AD2d 961; *Roth v. Goldman*, 254 AD2d 405]. In assessing a motion to dismiss made pursuant to CPLR §3211 (a)(1) on documentary evidence, the facts plead by plaintiff in the complaint are presumed to be true and are accorded every favorable inference. (*Rhiback v. Margulis*, 43 AD3d 1023).

There is a strong presumption against a finding of usury, and the defendants are required to establish usury by clear and convincing evidence which they have not done in this case. (*Zhavoronkin v. Koutmine*, 52 AD3d 597). Assuming all the facts in plaintiff's complaint are true, defendants United General title Insurance Company, and First American Title Insurance Company

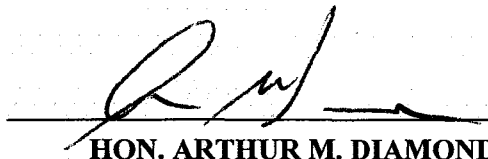
never recorded the Exeter mortgages and the mortgages were not first liens against the real properties of the borrower. Further, Mr Ali had remortgaged parcels 1 and 2 and plaintiff did not have a single first priority lien has thought. Contrary to defendants claim, the actual title insurance policies issued by defendants were to insure and secure a single priority lien on the real properties of the borrower. (Notice of Motion, Exhibit E, F). Further, the loans issued by plaintiff to Mr. Ali were not usurious under New York General Obligation Law §5-501 (6)(a) and New York Banking Law § 591-a [1]. Plaintiff is also federally exempted from the New York State Usury Statutes Under the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA) , 12 USCA §1735f-7a; Housing Community Development Act of 1974 807(a), 12 USCA §1735f-5b, opted-in by New York McKinney's Banking Law §14-a(1), which exempts residential first mortgage loans issued by a mortgage broker totaling more than one million dollars a year.

Accordingly, defendants have not met their burden of showing plaintiff's loans were usurious by clear and convincing evidence, and their motion is denied in its entirety.

This constitutes the decision and order of this Court.

ENTER

DATED: March 23, 2011



HON. ARTHUR M. DIAMOND

J. S.C.

ENTERED

MAR 25 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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