

Mac Donell v PHH Mtge. Corp.
2011 NY Slip Op 34360(U)
April 15, 2011
Supreme Court, Suffolk County
Docket Number: Index No. 12156-05
Judge: Elizabeth Hazlitt Emerson
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**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 2-24-11
SUBMITTED: 2-24-11
MOTION NO.: 005-MOT D

MARC MAC DONELL and MARY ANN MAC
DONELL, individually and on behalf of all
others similarly situated,

Plaintiffs,

-against-

PHH MORTGAGE CORPORATION, d/b/a
PHH MORTGAGE SERVICES,

Defendant.

x

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Upon the following papers numbered 1-13 read on this motion for summary judgment ; Notice of Motion and supporting papers 1-8 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 9-12 ; Replying Affidavits and supporting papers 13 ; it is,

ORDERED that the motion by the defendant for summary judgment dismissing the complaint is granted to the extent indicated below; and it is further

ORDERED that the motion is otherwise denied.

The plaintiffs were the owners of a single-family residence that they purchased in 1985. In 2004, they mortgaged the premises to secure the sum of \$271,000, which they borrowed from the defendant's predecessor in interest. On January 18, 2005, in anticipation of entering into a contract for the sale of the premises, the plaintiffs orally requested a payoff statement from the defendant, PPH Mortgage Services ("PPH"), for which they were charged \$20. On January 26, 2005, the plaintiffs executed a written contract to sell the premises to a third party. On March 2, 2005, in anticipation of the transfer of title, they orally requested a second payoff statement from PPH for which they were charged another \$20. Both payoff statements were faxed to the plaintiffs. The plaintiffs subsequently commenced this action, a purported class action, to recover the fees paid by them and others to the defendant for payoff statements. The defendant moved to dismiss the complaint for failure to state a cause of action. By an order dated January 17, 2006, this court found that the plaintiffs had stated cognizable causes of action under General Business Law § 349 (a) and Real Property Law § 274-a (2) and dismissed the plaintiff's causes of action for unjust enrichment, money had and received, and conversion on the ground that they were barred by the voluntary payment doctrine. That order was affirmed by the Appellate Division (45 AD3d 537). The defendant now moves for summary judgment dismissing the remaining causes of action under General Business Law § 349 (a) and Real Property Law § 274-a (2).

The court finds that, contrary to PPH's contentions, the first payoff statement was made in connection with the plaintiffs' sale of their home to a third-party. Pursuant to Real Property Law § 274-a (2), PPH was prohibited from charging the plaintiffs any fee therefor, including a fax fee for expedited delivery (*see, Negrin v Norwest Mtge.*, 263 AD2d 39, 45; *see also, Dougherty v North Fork Bank*, 301 AD2d 491). Neither the assertion that the plaintiffs voluntarily agreed to pay the fee nor the absence of allegations of a written demand for the payoff statement constitutes a defense (*see, Dowd v Alliance Mortgage Co.*, 32 AD3d 894, 894-895). The fact that Real Property Law § 274-a expressly prohibits the imposition of fees for payoff letters demanded in writing does not grant mortgagees such as PPH a license to impose unwarranted and unauthorized fees merely because a mortgagor happens to request the payoff documents by telephone (*see, Negrin v Norwest Mtge.*, *supra* 43-44). An oral request for a payoff statement should be honored with the same consideration as a written demand (*Id.* at 45). Real Property Law § 274-a was not intended to permit mortgagees to impose charges for payoff documents provided in response to oral requests when they are absolutely precluded from doing so in response to written demands (*Id.*).

PPH contends that an oral request for a payoff statement must meet the same requirements as a "bona fide written demand" under Real Property Law § 274-a (b) (iii). PPH, however, fails to provide any precedent therefor. The cases that have upheld the application of Real Property Law § 274-a to oral requests for payoff statements do not so hold (*see, Negrin v Norwest Mtge.*, *supra*; *Dowd v Alliance Mortgage Co.*, *supra*), nor do they provide any guidance on the issue of what constitutes a proper oral request under Real Property Law § 274-a.

PPH contends that an oral request for a payoff statement that is made to its automated Voice Response Unit (“VRU”) does meet the requirements of Real Property Law § 274-a (b) (iii). Although PPH contends that the plaintiffs’ second request was made through the VRU, PPH does not contend that the plaintiffs’ first request was made the same way, nor is there any evidence in the record regarding the content of that first request. The court finds that, under these circumstances, PPH has not established that the plaintiffs’ first request for payoff documents was insufficient as a matter of law. Accordingly, the court declines to dismiss the complaint insofar as it alleges that PPH violated Real Property Law § 274-a by charging a \$20 fee for the first payoff statement.

Under General Business Law § 349 (a), deceptive acts or practices in the conduct of any business conducted in this state are unlawful (**Negrin v Norwest Mtge.**, *supra* at 48). A purported violation of Real Property Law § 274-a is exactly the kind of small-money dispute to which General Business Law § 349 was meant to apply (**Id.** at 50). Accordingly, the court declines to dismiss the complaint insofar as it alleges that PPH violated General Business Law § 349 (a) by charging a \$20 fee for the first payoff statement:

PPH charged the plaintiffs \$20 for the second payoff statement requested by them. Real Property Law § 274-a (2) (a) provides that a mortgagee may charge not more than \$20 for each subsequent payoff statement provided thereunder. Thus, the second \$20 fee neither violated Real Property Law § 274-a nor General Business Law § 349 (a). Accordingly, the motion is granted and the complaint is dismissed insofar as it alleges that PPH violated Real Property Law § 274-a and General Business Law § 349 (a) by charging a \$20 fee for the second payoff statement.

Dated: April 15, 2011

HON. ELIZABETH HAZLITT EMERSON

J.S.C.