

**Ayala v Chase Home Fin. LLC**

2013 NY Slip Op 30093(U)

January 14, 2013

Sup Ct, Queens County

Docket Number: 19476/2011

Judge: Sidney F. Strauss

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS

IA PART 11

PABLO AYALA, GLORIA AGUILAR, x

Index

Number 19476/2011

Plaintiffs,

-against-

Motion Date: December 12, 2012

CHASE HOME FINANCE LLC,

Seq. No.: 3

Defendant,

x

The following papers numbered 1 to 4 were read on this motion by defendant JPMorgan Chase Bank, National Association, as successor by merger to Chase Home Finance LLC, s/h/s Chase Home Finance LLC (Chase) for an order lifting the stay and dismissing the complaint pursuant to CPLR 3211(a)(3) and (7).

Papers  
Numbered

Notice of Motion- Affidavits-Affirmation-Exhibits  
Memorandum of Law.....

1-4

Upon the foregoing papers this motion, submitted without opposition, is determined as follows:

Pablo Ayala executed a cooperative apartment fixed rate note dated September 10, 2007, whereby he agreed to make monthly payments of \$1,366.44 to the lender JP Morgan Chase Bank, N.A., in connection with a loan in the sum of \$208,000.00, together with yearly interest of 6.875%. Pablo Ayala and Gloria Aguilar executed a loan security agreement in favor of JP Morgan Chase Bank, N.A., dated September 10, 2007, granting a security interest in the proceeds of the sale of their 925 shares of stock in Sherwood Village Owners Corporation, and their proprietary lease for apartment 51, located at 99-05 58<sup>th</sup> Avenue, Corona, New York. Said security agreement secured the repayment of the \$208,000.00 loan, plus interest.

Chase Home Finance LLC, sent a 90 day notice dated June 2, 2010 to Mr. Ayala, pursuant to UCC §9-611(f). In a letter dated July 31, 2010, Chase Home Finance LLC

informed Mr. Ayala that he was in default in payment of the monthly installments commencing February 1, 2009, and gave notice of its intent to accelerate the loan. Notices of default dated December 13, 2010 and May 31, 2011 were mailed to Mr. Ayala and Ms. Aguilar.

Chase Home Finance LLC, in a notice of sale dated July 29, 2011, addressed to Mr. Ayala and Ms. Aguilar at the subject property informed them that the shares of stock and propriety lease would be sold at a non-judicial sale on August 19, 2011.

On August 17, 2011, plaintiffs commenced the within action for injunctive relief and damages and allege in the verified complaint four causes of action for a violation of General Business Law §349, for breach of implied covenant of good faith and fair dealing, for failure to comply with the notice requirements of UCC §9-611(f)(2), and lack of standing to proceed with a foreclosure sale under the UCC. Plaintiff Gloria Aguilar stated in her verification that she is married to Pablo Ayala and that she has a power of attorney over his financial affairs.

Plaintiffs obtained a temporary restraining order on August 16, 2011, which was thereafter vacated on December 5, 2011. In the order dated December 5, 2011, this court denied the plaintiffs motion for declaratory judgment and injunctive relief, and defendant served a verified answer on January 6, 2012, and an amended verified answer on January 24, 2012.

This court, in an order dated April 4, 2012, granted the motion by plaintiffs' counsel to be relieved, and stayed all proceedings for a period of 30 days to enable plaintiffs to obtain new counsel. The 30 day stay commenced on the date of service of said order. Plaintiffs' counsel, in a letter dated May 18, 2012 informed Ms. Aguilar that he had been relieved as her counsel. Said letter indicated that a copy of the court's order was enclosed. Defendant's counsel served a copy of the April 4, 2012 order upon Mr. Ayala,

There is no evidence that plaintiffs have retained new counsel, and as the 30 day period expired prior to the service of the within motion, the stay imposed by the order of April 4, 2012 is hereby vacated.

That branch of defendant's motion which seeks to dismiss the complaint on the grounds of lack of capacity pursuant to CPLR 3211(a)(3) is denied. Defendant has waived this defense, as it failed to raise it in its answer or amended answer, and failed to timely move for such relief prior to serving its answer (CPLR 3211[e]).

Turning now to the remainder of defendant's motion, it is well settled that "[o]n a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of

action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Rabos v R & R Bagels & Bakery, Inc.*, AD3d , 2012 NY Slip Op 07974, 2012 Lexis 7945 [2012] citing *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2008]; and *Leon v Martinez*, 84 NY2d 83 [1994]). Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 274-275 [1977]; *Norment v Interfaith Ctr. of NY*, 98 AD3d 955 [2012]).

“Cooperative apartments are personal property, not real property” (*Matter of Pollack*, 18 AD3d 555, 557 [2005]). Where a cooperative tenant defaults “on a security agreement which underlies a loan related to the purchase of shares in a cooperative, the remedies found in UCC article 9 are available to the lender” (*Fridman v Dime Sav. Bank of N.Y.*, 204 AD2d 387, 388 [1994]). To that end, UCC 9-610 governs nonjudicial foreclosure sales in New York State (*LI Equity Network, LLC v Village in the Woods Owners Corp.*, 79 AD3d 26 [2010]). UCC 9-610 (a) states that when a debtor defaults on a security agreement, the secured party “may sell, lease, license, or otherwise dispose of any or all of the collateral.”

UCC 9-611(f), which became effective on January 14, 2010, requires that residential homeowners of cooperative apartments be sent a notice 90 days before the sale or other disposition of cooperative shares held as collateral. Said 90-day is “very particular in its requirements, and provides information about counseling services and other matters that may assist cooperative apartment homeowners in obtaining help when faced with the potential loss of a home \*\*\*.” (*Stern-Obstfeld v Bank of America*, 30 Misc 3d 901, 905-906 [2011]).

The Home Affordable Modification Program (HAMP) is as a federal program established pursuant to the Emergency Economic Stabilization Act of 2008 (*see Rivera v Bank of Am. Home Loans.*, 2011 US Dist. LEXIS 43138 [2011]). HAMP was designed to help financially struggling homeowners by reducing their monthly loan payments to an affordable level, and provides financial incentives to loan servicers and investors to encourage them to modify the terms of existing private mortgages in order to avoid foreclosure (*see Thomas v JPMorgan Chase & Co.*, 811 F Supp 2d 781, 786-87 [2011]). HAMP is administered by the Federal National Mortgage Association (“Fannie Mae”), which enters into Servicer Participation Agreements (SPA) with individual servicers to perform loan modifications. Participation in the program is voluntary, and the servicer ultimately

determines whether a borrower is eligible for a loan modification (*see Gorbaty v Wells Fargo Bank, N.A.*, 2012 US Dist. LEXIS 55284 [2012]). It is alleged that defendant entered into a SPA with Fannie Mae.

HAMP does not provide a private cause of action, nor may a plaintiff enforce the SPA as a third-party beneficiary (*see Griffith-Fenton v Chase Home Fin.*, 2012 US Dist. LEXIS 99450 [2012]; *Thomas v JPMorgan Chase & Co.*, 811 F Supp. 2d at 797; *Rivera v Bank of Am. Home Loans*, 2011 US Dist. LEXIS 43138, 2011 WL 1533474; *see also Stern-Obstfeld v Bank of America* ).

Plaintiffs, in their first cause of action expressly acknowledge that there is no private right of action under HAMP, and state that their claim is brought under General Business Law §349. A cause of action for a deceptive business practices under General Business Law § 349 must include an allegation of a consumer-oriented act or practice that is misleading in a material way which causes injury to the party seeking relief (*see Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]). An act is deceptive if it is likely to mislead a reasonable consumer acting reasonably under the circumstances (*see Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 26 [1995]). The act need not constitute common-law fraud to be actionable (*see Stutman v Chemical Bank*, 95 NY2d at 29). An individual mortgagor who has been the victim of misleading practices by a mortgagee has been held to have a remedy under General Business Law § 349 (*see e.g. Popular Financial Services, LLC v Williams*, 50 AD3d 660 [2008]; *Delta Funding Corp. v Murdaugh*, 6 AD3d 571 [2004]).

Defendant argues that plaintiffs have not alleged a consumer-oriented practice or materially misleading act, and that the first cause of action is either an improper HAMP claim in disguise, or a private contractual dispute which is not actionable under General Business Law §349. (*Elacqua v Physicians' Reciprocal Insurers*, 52 AD3d 886 [ 2008]).

The question to be resolved here is not whether plaintiffs "can ultimately establish [their] allegations" and are likely to prevail, but whether, if believed, their complaint sets forth facts that constitute a viable cause of action (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Here, the allegations in the complaint, if accepted as true and accorded the benefit of every favorable inference, state such a claim under General Business Law §349. Plaintiffs allege that defendant made false and misleading statements regarding the harm caused by the discontinuance of the mortgage (loan) payments; that it urged plaintiff to call back when delinquent; that it misrepresented the available means of curing the default; that it failed to disclose the necessary details of a forbearance agreement; and that it failed to offer plaintiffs an opportunity to evaluate their eligibility under HAMP. On a motion to dismiss, these facts sufficiently allege a consumer practice, as these alleged practices have ramifications to the public at large and not unique to the plaintiffs (*see*

*generally Skibinsky v State Farm Fire & Cas. Co.*, 6 AD3d 975, 976 [ 2004]; *see also Pandit v Saxon Mortg. Servs.*, 2012 US Dist. LEXIS 133292 [2012]).

Plaintiffs' second cause of action for breach of the implied covenant of good faith and fair dealing is based upon the defendant's alleged failure to evaluate plaintiffs' under HAMP. Plaintiffs allege that defendant has an implied covenant under the mortgage and note to comply with a workout option. Plaintiffs were neither a party to the SPA nor an intended third-party beneficiary of that agreement. As such, they cannot enforce any covenant of that agreement, explicit or implied. The only agreement to which plaintiffs are a party is the original loan and security agreement. Plaintiffs' allegations of breach of the covenant of good faith and fair dealing concerns Chase's HAMP obligations under the SPA, and not under the original loan documents. Therefore, that branch of defendant's motion which seeks to dismiss the second cause of action for breach of the covenant of good faith and fair dealing, is granted (*see generally Costigan v CitiMortgage, Inc.*, 2011 US Dist. LEXIS 84860 [2011]).

Plaintiffs' third cause of action alleges a violation of due process in that defendant's notices did not conform to UCC 9-611(f), and seeks to prohibit the defendant from "indefinitely" proceeding with a foreclosure sale. This cause of action states a cognizable claim to the extent that defendant's are alleged to have failed to comply with the provisions of UCC 9-611(f). Defendant concedes that it cannot proceed to an auction sale pursuant to said notice, as the date of sale has long since passed and a new 90-day notice would have to be served upon the plaintiffs. Therefore, this cause of action for injunctive relief is now moot, as the 90-day notice previously served is admittedly ineffective. That branch of defendant's motion which seeks to dismiss the third cause of action, is granted.

The fourth cause of action states a claim to enjoin defendant from proceeding with a sale of the secured shares of stock and propriety lease on the grounds that defendant lacks the authority to conduct such a sale. Although the complaint improperly utilized terms commonly found in mortgage foreclosure proceedings, plaintiffs allege that the original loan and security agreement were executed with JP Morgan Chase Bank, N.A. and that they have not been provided with any information as to whether these agreements were assigned to the defendant Chase Home Finances LLC. Defendant argues that it has no obligation to demonstrate that it is the holder or assignee of the note and security agreement as it has not brought an action for foreclosure against the plaintiffs. However, as plaintiffs are challenging defendant's authority to proceed with a non-judicial sale, defendants are required to demonstrate that they are the secured party under UCC 9-610. That branch of defendant's motion which seeks to dismiss the defendant's fourth cause of action, therefore, is denied.

In view of the foregoing, defendant's motion is granted to the extent that the second and third causes of action are dismissed, and is denied as to the first and fourth causes of action.

Dated: January 14, 2013

.....  
SIDNEY F. STRAUSS, J.S.C.