

Ramirez v Emigrant Mtge. Co.
2013 NY Slip Op 31529(U)
July 10, 2013
Sup Ct, New York County
Docket Number: 109214/10
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

RICARDO RAMIREZ,
Plaintiff,

Index No.: 109214/10

Motion Date: 10/11/12

- v -

Motion Seq. No.: 02

EMIGRANT MORTGAGE COMPANY,
Defendant.

Motion Cal. No.: _____

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

FILED

JUL 16 2013

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion: Yes No

COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers,

Defendant moves for summary judgment dismissing this action in its entirety. Plaintiff, appearing pro se, opposes the motion.

Plaintiff's summons and complaint alleges that the loan that is the subject of this action was made in violation of the federal Truth in Lending Act (15 USC § 1601 et seq.) (TILA) and that plaintiff was "deceptively convinced to agree to [] unfair and abusive loan terms with an unreasonably high interest rate."

The terms of plaintiff's loan, as set forth in the

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

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

"Collateral Note and Security Agreement (Cooperative Apartment)" dated January 17, 2008, called for a principal loan amount of \$106,000 at an initial interest rate of 12.500%. After five years this "teaser" rate was to become a variable rate which would adjust on an annual basis based upon the yield on certain United States Treasury securities. After the first change of interest rate upon the expiration of the teaser rate, the variable rate could not change more than two percentage points in any year and could not increase beyond 17.50%. As is relevant in this action, Section 13 of the Agreement provides that nonpayment of maintenance charges by defendant constitutes an event of default allowing acceleration of the debt (Section 14) and a non-judicial foreclosure sale of the premises (Section 15).

Defendant states, without contravention, that since December 2008 plaintiff has failed to pay maintenance charges to the cooperative as required by the proprietary lease and that defendant has paid the maintenance arrears since that time in order to protect its security interest in the shares allocated to the premises. Defendant also asserts that plaintiff is in default in paying principal and interest on the mortgage note since July 2009. Based upon plaintiff's defaults defendant scheduled a foreclosure sale of plaintiff's apartment the most recent of which was stayed by prior order of this court.

Defendant sets forth four bases for summary dismissal of plaintiff's claims. Defendant argues that plaintiff's TILA claims cannot be maintained because they are time-barred. Secondly, defendant argues that because plaintiff admits that the loan was for a business purpose it does not come within the ambit of TILA. Third, defendant asserts that plaintiff has failed to demonstrate that it made any fraudulent misrepresentation in connection with the loan and thus plaintiff's claims, to the extent they sound in fraud or allege a statutory violation under General Business Law (GBL) §349, are subject to dismissal. Fourth, defendant points out that all of the causes of action asserted in the Complaint, having their genesis in the making of the loan, pre-date the bankruptcy petition that plaintiff filed in January 2010. Defendant argues that since plaintiff listed none of the claims as assets in such petition, such claims are deemed waived by him.

Starting with defendant's last argument, the court disagrees that the claims at bar are deemed waived under the circumstances that plaintiff did not list them as assets in his bankruptcy petition. Such waiver applies where such claims were "dealt with", resulting in a discharge of the debtor in bankruptcy. Dynamics Corp of Am v Marine Midland Bank- NY, 69 NY2d 191 (1987). Defendant does not refute plaintiff's statement that he

was never discharged but that the bankruptcy petition was denied because plaintiff missed the bankruptcy court hearing.

The timeliness of plaintiff's TILA claims requires a nuanced analysis of the terms of that statutory enactment. 15 USC 1640 (e) provides in pertinent part that

Except as provided in the subsequent sentence, any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation or, in the case of a violation involving a private education loan (as that term is defined in section 1650(a) of this title), 1 year from the date on which the first regular payment of principal is due under the loan. Any action under this section with respect to any violation of section 1639, 1639b, or 1639c of this title may be brought in any United States district court, or in any other court of competent jurisdiction, before the end of the 3-year period beginning on the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law.

15 USC 1640 (e); see also 15 USC 1635 (f) ("obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first").

Defendant correctly argues the general statute of limitations under TILA is one-year and that if that were the applicable limitations period plaintiff's claims under the statute would be barred as the date of the transaction is January

17, 2008, and this suit was commenced on July 13, 2010. However, defendant's argument fails because plaintiff's claims here are asserted as a defense to defendant's non-judicial foreclosure proceeding seeking recoupment or set-off in connection with defendant's alleged TILA violation. As defendant cites no state law that places a limitation on plaintiff's time to seek such recoupment or set-off in opposition to defendant's non-judicial foreclosure, plaintiff's claims are not time-barred by the terms of the afore-cited 15 USC 1640 (e).

Defendant also argues that plaintiff's claim does not come within TILA because the pursuant to 15 USC 1603 (1) TILA does not apply to "[c]redit transactions involving extensions of credit primarily for business, commercial, or agricultural purposes, or to government or governmental agencies or instrumentalities, or to organizations." See also 15 USC 1602 (I) ("adjective "consumer", used with reference to a credit transaction, characterizes the transaction as . . . primarily for personal, family, or household purposes"). As cited by the defendant,

TILA applies only to consumer credit transactions and, therefore, does not apply to credit extended for "business, commercial, or agricultural purposes." The Second Circuit has not articulated a standard for determining whether a loan is obtained for personal or business purposes under TILA. Most other courts that have addressed the issue have held that a court must look at the entire transaction and surrounding circumstances to determine a borrower's primary motive. . . . As a general matter, the burden is on plaintiff to show that the loan in question was obtained for personal, as opposed to business, purposes.

Mauro v Countrywide Home Loans, Inc., 727 F Supp 2d 145, 153 -154
(ED NY 2010) (citations and internal quotations omitted).

Defendant relies principally upon plaintiff's statement in the complaint that plaintiff "was offered an unsecured business loan by the lender['s] agent and upon finding that plaintiff['s] principal dwelling was owned free and clear plaintiff was convinced to use it as collateral for the loan." Defendant asserts that this statement combined with the statements in plaintiff's affidavit submitted on the prior motion for a preliminary injunction establishes that the loan was for a business purpose and not within the protection of TILA. Defendant's assertions are not supported by the record on this motion however.

Contrary to defendant's argument, plaintiff does not assert that the loan was to be used for business purposes. Rather, in his affidavit, sworn to on September 30, 2010, plaintiff states that, at the urging of a third party, he used his home as collateral to obtain a loan since that third party told him that his business was not established long enough to secure a loan. He states that he was having severe financial difficulty supporting his family and sought the loan to help with his personal financial obligations, including substantial medical bills of unemployed members of his household. In light of plaintiff's sworn statements, the court cannot determine as a

matter of law that the loan was made for a business purpose. See In re Dawson, 411 BR 1, 37 -38 (Bankr D DC 2008) (unsophisticated borrower not estopped from asserting loan was for personal purposes where facts demonstrated the character of the loan was personal irrespective of the nomenclature used in documents).

However, the court finds that defendant has established a prima facie case that it did not violate the disclosure requirements of TILA in effect at the time the loan was made to plaintiff. Plaintiff claims that defendant failed to assess his ability to repay the loan. Under the current version of TILA (15 USC 1639, 15 USC 1639c & 15 USC 1602 [b] [b]) such a claim would be cognizable. However, 15 USC 1639c was only enacted in 2010 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act and therefore its requirement that lenders consider a debtor's "ability to repay" a loan is inapplicable to plaintiff's case. Similarly, 15 USC 1639 and Regulation Z (12 CFR 226.32) are inapplicable because the transaction here is not a "high-cost mortgage" as defined in 15 USC 1602 (b) (b).

Defendant demonstrates prima facie on this motion that it complied with TILA as in effect at the transaction's consummation. Defendant produces copies of a TILA disclosure signed by plaintiff setting forth the payments due under the loan together with the applicable interest rate and the fact that the rate was variable. Plaintiff was also provided with, and signed

an acknowledgment of, a Notice of Right to Cancel. Plaintiff not only signed the Notice upon receipt on January 17, 2008, but also signed the Notice six days later certifying that he had not exercised the right to rescind the transaction. Defendant further produces a copy of the mortgage commitment letter signed by the defendant which contrary to plaintiff's allegations sets forth, in pertinent part, the terms of the loan including the variable adjustable interest rate, the initial payment amount, the interest rate to be charged upon default, and a rider concerning the balloon payment due should the loan term extend beyond the term of the proprietary lease.

In opposition to the motion plaintiff fails to demonstrate what TILA disclosures, if any, defendant omitted. Therefore, plaintiff's claims under TILA must be dismissed.

To the extent that plaintiff's complaint alleges causes of action for fraud and misrepresentation against the defendant, such claims, upon defendant's motion, must be dismissed. Plaintiff has not alleged any material misrepresentation or omission by the defendant and therefore such a cause of action must fail. Wint v ABN Amro Mortg. Group, Inc., 19 AD3d 588, 589 (2d Dept 2005) ("plaintiff, inter alia, failed to allege any material misrepresentation by the defendant and/or a material omission it knew to be false"). At most, plaintiff alleges that the mortgage broker he contractually engaged may have

misrepresented his payments under the mortgage. However, plaintiff does not refute the brokerage contract dated July 23, 2007 signed by him and there is no evidence that the broker held itself out as representing the lender or that plaintiff relied on the appearance of such representation.

Plaintiff's further argument that he didn't understand the loan documents due to his limited command of English is insufficient to defeat defendant's motion. Plaintiff, not defendant initiated this transaction by retaining a mortgage broker. Plaintiff's complaint states that he at first sought a loan secured by his business and then at the suggestion of the broker apparently sought a loan secured by a mortgage on his residence. Plaintiff's allegation that he did not understand the consequences of the documents he signed is belied by the fact that he does not challenge the nature of the transaction but merely that its financial terms, which he signed acknowledgment of, were unfair to him. Plaintiff never attempted to rescind the transaction although given notice of his right to do so and there is no evidence that defendant was aware of plaintiff's alleged inability to understand the transaction. In light of plaintiff's representation by a broker of his choosing during the transaction, plaintiff's allegations of fraud based solely on an alleged lack of English proficiency are insufficient to bar foreclosure by defendant. See Zisser v Noah Indus. Marine & Ship

Repair, Inc., 129 AD2d 795, 796 (1987) (papers submitted to court in foreclosure action show party's understanding of transactions at issue and language proficiency and that party was represented).

Finally, pursuant to CPLR 3408 which mandates a court mediated settlement conference in residential foreclosure actions, this court, by Order dated February 1, 2011, referred this action to the Mortgage Foreclosure Part, Supreme Court, New York County. The rules of that Part require both parties "to negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible". See Wells Fargo Bank, NA v Meyers, 2013 NY Slip Op 03085, *2 (2d Dept 2013). By Order dated September 15, 2011, this action was returned to this Part upon a finding that "no settlement has been reached, and this Court finds that further negotiations would not produce one." In addition, plaintiff does not dispute defendant's contention that in November 2009, defendant voluntarily canceled the foreclosure sale scheduled at that time in order to engage plaintiff in negotiations to enter into a loan modification. Unfortunately, the prior negotiations were unsuccessful as well, but perhaps plaintiff may wish to consult with a counselor from the US Department of Housing and Urban Development about his eligibility for a "deed for lease" or "mortgage to lease" option in lieu of foreclosure.

Accordingly, it is

ORDERED that defendant's motion to dismiss plaintiff's complaint is GRANTED and this action is DISMISSED; and it is further

ORDERED that the preliminary injunction granted by Order of this court dated February 1, 2011 is hereby vacated.

This is the decision and order of the court.

Dated: July 10, 2013

ENTER:

~~Debra A. James~~
DEBRA A. JAMES J.S.C.

FILED
JUL 16 2013
COUNTY CLERK'S OFFICE
NEW YORK