

Emigrant Bank v Boleslawski
2014 NY Slip Op 30092(U)
January 14, 2014
Sup Ct, New York County
Docket Number: 100471/2012
Judge: Doris Ling-Cohan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
EMIGRANT BANK f/k/a EMIGRANT SAVINGS BANK
and EMIGRANT MORTGAGE COMPANY, INC.,

INDEX NO.
100471/2012

Plaintiffs,

-against-

DECISION

EUGENE BOLESZLAWSKI,

Motion Seq. No.: 002

Defendant.

-----X
The following papers, numbered 1 to 4 were considered on this motion by defendant for summary judgment:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1, 2, 3
Answering Affidavits - Exhibits	3
Replying Affidavits (Reply Memo)	4

FILED

Cross-Motion: ☐ Yes ☒ NO

JAN 16 2014

LING-COHAN, J.

NEW YORK
COUNTY CLERK'S OFFICE

Defendant's motion for summary judgment is denied, for the reasons stated below.

Background

The complaint asserts causes of action for fraud and unjust enrichment. Plaintiffs maintain that defendant intentionally defrauded plaintiffs/lenders, by concealing the fact that a mortgage held by defendant was already satisfied, when plaintiffs paid defendant to satisfy a mortgage on the same property. Defendant denies plaintiff's allegations and has moved for summary judgment of dismissal.

It is noted that at the time of the filing of the within motion by defendant, depositions of the parties had yet to be conducted. Since such time, depositions of the parties have been held, and a note of issue has been filed.

It is not disputed that defendant previously held two separate mortgages on undeveloped property at Perrins Peak, in Stony Point, New York ("Perrins Peak property"), one for \$383,000 and one for \$500,000. The owners of such property and debtors on such mortgages were non-parties, John B. Quattrocchi and Ann M. Quattrocchi. Defendant also held a mortgage for \$366,000, on a premises at 100 Bucksberg Road, Tomkins Cove, New York ("Bucksberg Road property"), also owned and mortgaged by the Quattrocchis. The Quattrocchis sought to refinance the mortgages which were held by defendant, totaling \$1,249,000, and did so by obtaining two (2) mortgages on the Perrins Peak property, one (1) from IndyMac Bank in the amount of \$535,000, and one (1) from plaintiffs in the amount of \$750,000.

In connection with such mortgages on the Perrins Peak property given by IndyMac Bank and plaintiffs, two (2) separate closings were conducted, one (1) business day apart. The IndyMac Bank closing preceded the closing conducted by plaintiffs. As a result of such closings and mortgages given by IndyMac Bank and plaintiffs to the Quattrocchis, defendant received payments of \$724,942.11 from plaintiffs and \$495,961.43 from IndyMac Bank, totaling \$1,220,903.50, which, together with some additional funds paid by a Quattrocchi family member, satisfied the three (3) mortgage loans totaling \$1,249,000, owed by the Quattrocchis on the two (2) properties (the Perrins Peak property and the Bucksberg Road property).

Plaintiffs maintain that if they had known that another payment and satisfaction had been given on the Perrins Peak property, which in essence placed their security interest in the Perrins Peak property, subordinate to that of IndyMac, they never would have agreed to the loan to the Quattrocchis and paid off the Quattrocchis obligations to defendant, in the amount of \$724,942.11. According to plaintiffs, the Quattrocchis have since defaulted on both the IndyMac mortgage and plaintiffs' mortgage.

In seeking summary judgment, defendant argues that plaintiffs' claims have no merit.

Discussion

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “succinctly to warrant the court as a matter of law in directing judgment.” CPLR § 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). “Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” *Winegrad v NYU Medical Ctr.*, 64 NY2d 851, 853 (1985); *Bowie v 2377 Creston Realty, LLC*, 14 AD3d 457, 459 (1st Dept 2005); *Diaz v Nunez*, 5 AD3d 302, 303 (1st Dept 2004). To grant summary judgment it must be clear that no material and triable issue of fact is presented. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957). The court should draw all reasonable inferences in favor of the non-moving party, and should not pass on issues of credibility. *Dauman Displays, Inc. v. Masturzo*, 168 AD2d 204 (1st Dept 1990).

Applying such principles herein, as detailed below, defendant’s motion for summary judgment is denied, as defendant failed to establish entitlement to judgment as a matter of law. Significantly, absent from defendant’s moving papers is *an affidavit from defendant*, in which he affirmatively denies the allegations made by plaintiffs in the complaint as to any alleged fraud or unjust enrichment and/or from knowingly participating in a scheme to procure the proceeds of two (2) mortgage loans paid by plaintiffs and IndyMac. While in support of the within motion, defendant submits and relies upon an affidavit by the attorney that represented defendant in obtaining satisfaction of the three (3) mortgages defendant held on the Quattrocchi’s properties, Ned Kopald (“Kopald”), such affidavit indicates that it was prepared by Kopald, in support of defendant’s opposition to plaintiffs’ prior motion to amend the complaint, and *not* in support of defendant’s motion for summary judgment. Further, such an affidavit from a non-party is insufficient as to the allegations asserted against defendant.

Moreover, while defendant claims that plaintiffs were made fully aware of the status of defendant’s loans to the Quattrocchis, definitive proof as to such is lacking. Additionally, in opposition, plaintiffs vehemently dispute such fact.

Contrary to defendant's assertions, according to Carl Barone, the attorney for plaintiffs who handled the closing with the Quattrocchis, plaintiffs were not aware that the Quattrocchis had borrowed \$535,000 from IndyMac, one (1) business day prior to plaintiffs closing with the Quattrocchis, in which defendant was paid \$495,961.43, in satisfaction of defendant's \$500,000 mortgage on the Perrins Peak property or that defendant had delivered to IndyMac at such closing, a satisfaction of his \$383,000.00 mortgage. Such position by plaintiffs is supported by the affidavit by Donna s. Lanviere, the manager of Perfect Abstract, Inc., the abstract company that handled the IndyMac loan closing. Exhibit 9, Affirmation in Opposition. In such affidavit, Ms. Lanviere avers that IndyMac was to have a first mortgage on the Perrins Peak property and that defendant's lawyer had indicated, prior to the IndyMac Bank loan closing, that defendant's \$383,000 mortgage on the Perrins Peak property had already been paid in full. *Id.* Specifically, according to Ms Lanviere, at the closing with IndyMac, which occurred on August 3, 2007, one (1) business day prior to plaintiffs' closing, "an individual appeared on behalf of Boleslawski's attorney and delivered the original Satisfaction for the \$383,000.00 mortgage to be recorded". Ms. Lanviere further maintains that "[a]s part of [the IndyMac] closing, the \$500,000.00 mortgage held by Eugene Boleslawski was paid off from the proceeds...The satisfaction for the \$500,000.00 was to be delivered thereafter...". *Id.* at ¶8. Thus, according to Ms. Lanviere, it was her belief that "there were no prior mortgages in existence at the time the \$535,000.00 loan and mortgage [from IndyMac] were executed by the Quattrocchis. Thus, there are clearly factual issues here, as to the circumstances surrounding the granting of the mortgage by plaintiffs, and defendant's role, if any, and as to whether any fraud or unjust enrichment occurred.

Additionally, while defendant argues that it is entitled to summary judgment because "plaintiffs cannot demonstrate fraudulent misrepresentation" [Defendant's Memorandum of Law at 3] or unjust enrichment, it is *not* plaintiffs' burden on this motion, *but, rather, defendant's burden* to prove a lack of fraud and unjust enrichment, which defendant failed to do in the submissions before the court. It is well established that a defendant does not carry its burden in moving for "summary judgment by pointing to gaps in plaintiff[s'] proof", but must affirmatively demonstrate

the merit of its claim or defense. *Bryan v. 250 Church Assoc., LLC*, 60 AD3d 578 (1st Dept 2009)(citation omitted); *see also Torres v. Industrial Container*, 305 AD2d 136 (1st Dept 2003).

Thus, as defendant has failed to establish his burden of proving entitlement to judgment as a matter of law, defendant's motion is denied, regardless of the sufficiency of the opposing papers. *See Winegrad v. New York Univ Med. Ctr.*, 64 NY2d at 853; *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Vitiello v. Mayrich Constr. Corp.*, 255 AD2d 182, 184 (1st Dept 1998).

As stated above, the court further notes that, at the time of the filing of the within motion, no depositions had been taken and, thus, no party transcripts were supplied in the within submissions. While since such time depositions have been conducted and a note of issue filed, the parties have not sought to supplement their papers with additional proof.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that, within 30 days of entry of this order, plaintiffs shall serve a copy upon all parties, with notice of entry.

FILED

JAN 16 2014

Dated: January 14, 2014

**NEW YORK
COUNTY CLERK'S OFFICE**

Doris Ling-Cohan, J. S. C.

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

J:\Summary Judgment\emigrant mortgage boleslawski.wpd