

Emigrant Sav. Bank-Long Is. v Pollock

2014 NY Slip Op 32527(U)

September 16, 2014

Supreme Court, Suffolk County

Docket Number: 12-3259

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

P R E S E N T :

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 8-5-13
ADJ. DATE 9-11-14
Mot. Seq. # 001 - MG

-----X

EMIGRANT SAVINGS BANK - LONG ISLAND,

Plaintiff,

- against -

MAUD N. POLLOCK, and "JOHN DOE" AND "MARY DOE", the last two names being fictitious and intended to be the persons or corporations in possession of the mortgaged premises herein under foreclosure and described in the Complaint as tenants or occupants thereof, their true names being unknown to Plaintiff,

Defendants.

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Upon the following papers numbered 1 to 58 read on this motion for summary judgment and an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 31; ~~Notice of Cross Motion and supporting papers _____~~; Answering Affidavits and supporting papers 32 - 40; Replying Affidavits and supporting papers 41 - 58; ~~Other _____~~; it is,

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion by plaintiff Emigrant Savings Bank-Long Island for an Order, pursuant to CPLR 3212, for summary judgment on its complaint, for leave to amend the caption of this action pursuant to CPLR 3025 (b) and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

ORDERED that the caption is hereby amended by substituting Emigrant Bank, as successor-by-merger with Emigrant Savings Bank-Long Island in place of Emigrant Savings Bank-Long Island and by striking therefrom defendants "John Doe" and "Mary Roe"; and it is further

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ORDERED that plaintiff is directed to serve a copy of this Order amending the caption of this action upon the Calendar Clerk of this Court; and it is further

ORDERED that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF SUFFOLK

 EMIGRANT BANK, AS SUCCESSOR-BY-MERGER
 WITH EMIGRANT SAVINGS BANK—LONG ISLAND,

Plaintiff,

- against -

MAUD N. POLLOCK,

Defendant.

ORDERED that plaintiff is directed to forthwith submit a proposed order appointing a referee to compute pursuant to RPAPL 1321 in conformity with this decision, on notice to defendant.

This is an action to foreclose a mortgage on premises known as 57 North Road, Hampton Bays, New York. On June 12, 2008, defendant Maud N. Pollock (“Pollock”) executed an adjustable rate note in favor of Emigrant Mortgage Company agreeing to pay \$1,250,000.00 at the starting yearly interest rate of 7.875 percent. On the same date, defendant Pollock executed a first mortgage in the principal sum of \$1,250,000.00 on the subject property. The mortgage was recorded on September 16, 2008 in the Suffolk County Clerk’s Office. Thereafter, the note and mortgage were transferred by assignment of mortgage dated June 12, 2008 from Emigrant Mortgage Company to plaintiff Emigrant Savings Bank—Long Island (“Emigrant”). The assignment of mortgage was recorded on August 26, 2011 with the Suffolk County Clerk’s Office.

A notice of default dated September 13, 2011 was sent to defendant Pollock stating that her mortgage loan was in default and that the amount past due was \$86,951.44. As a result of her continuing default, plaintiff commenced this foreclosure action on January 30, 2012. In its complaint, plaintiff alleges in pertinent part that defendant Pollock breached her obligations under the terms of the note and mortgage by failing to make her monthly payment due on January 1, 2013. Defendant Pollock interposed an answer with 17 affirmative defenses and two counterclaims. Plaintiff served a reply to the counterclaim with 18 affirmative defenses.

The Court’s computerized records indicate that a foreclosure settlement conference was held on April 8, 2013, at which time this matter was referred as an IAS case since a resolution or settlement had

not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves for summary judgment on its complaint contending that defendant Pollock defaulted under the terms of the note and mortgage by failing to make payments when due and that defendant's answer and defenses are without merit. In support of its motion, plaintiff submits among other things: the sworn affidavit of Maryann Monteserrato, assistant treasurer at Emigrant Mortgage Company, Inc.; the pleadings; the note, mortgage and assignment of mortgage; the affirmations of David Olsen, Esq. and William M. Rifkin, Esq. in support of the instant motion; the affirmation of William M. Rifkin, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); proof of notices pursuant to RPAPL 1320, 1303 and 1304; affidavits of service of the summons and complaint; and an affidavit of service of the instant summary judgment motion upon defendant Pollock's attorney. Defendant Pollock opposes the application.

"[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default" (see *Republic Natl. Bank of N.Y. v O'Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]). Once a plaintiff has made this showing, the burden then shifts to defendant to produce evidentiary proof in admissible form sufficient to require a trial on their defenses (see *Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]).

Here, plaintiff has established its *prima facie* entitlement to summary judgment against the answering defendant as such papers included a copy of the unpaid note, mortgage, an assignment of mortgage together with due evidence of defendant Pollock's default in payment under the terms of the loan documents (see CPLR 3212; RPAPL 1321; *Neighborhood Hous. Serv. of New York City v Hawkins*, 97 AD3d 554, 947 NYS2d 321 [2d Dept 2012]; *Baron Assoc., LLC v Garcia Group Enter.*, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; *Citibank, N.A. v Van Brunt Prop., LLC*, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]).

Once plaintiff has made a *prima facie* showing, it is incumbent upon the answering defendant to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's *prima facie* showing or in support of the affirmative defenses asserted in their answer or otherwise available to them (see *Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Grogg Assocs. v South Rd. Assocs.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]).

In opposition, defendant Pollock, re-asserted her pleaded affirmative defenses, *inter alia*, that the mortgage loan was usurious and void; that plaintiff, at the time of the making of the loan, had actual knowledge that the defendant would be unable to make monthly payments; and, that plaintiff in making this loan failed to act in good faith by violating the laws of the United States, including but not limited to

“TARP” and “HAMP.” Neither the defenses raised in defendant’s answer nor those asserted in opposition rebut the plaintiff’s *prima facie* showing of its entitlement to summary judgment.

With respect to the fourth and fifth affirmative defenses and first counterclaim asserted by defendant based upon usury, the maximum interest rate on a loan is 16 percent per annum (see General Obligations Law § 5–501 [1]; Banking Law § 14–a [1]). To successfully raise the defense of usury, a debtor must allege and prove by clear and convincing evidence that a loan or forbearance of money, requiring interest in violation of a usury statute, was charged by the holder or payee with the intent to take interest in excess of the legal rate (see *Giventer v Arnov*, 37 NY2d 305, 372 NYS2d 83 [1975]). If usury can be gleaned from the face of an instrument, intent will be implied and usury will be found as a matter of law (see *Fareri v Rain’s Intl.*, 187 AD2d 481, 589 NYS2d 579 [2d Dept 1992]). To determine whether a transaction is usurious, courts look not to its form but to its substance or real character (see *O’Donovan v Galinski*, 62 AD3d 769, 878 NYS2d 443 [2d Dept 2009]). If an instrument provides that the creditor will receive additional payment in the event of a contingency beyond the borrower’s control, the contingent payment constitutes interest within the meaning of the usury statutes (see *Diehl v Becker*, 227 NY 318 [1919]; *Browne v Vredenburg*, 43 NY 195 [1870]). To constitute usury, “it must appear that the real purpose of the transaction was, on the one side, to lend money at usurious interest reserved in some form by the contract and, on the other side, to borrow upon the usurious terms” (*Donatelli v Siskind*, 170 AD2d 433, 565 NYS2d 224 [2d Dept 1991]).

The record reveals that the defendant signed an adjustable rate note in the amount of \$1,250,000.00 with a starting yearly interest rate of 7.875 percent. Defendant asserts in opposition that the sum of \$275,000.00, which was held back by Emigrant to further collateralize the loan, caused the effective rate of interest to be in the amount of 23.6 percent. Plaintiff argues that the sum of \$275,000.00 was an escrow holdback or interest reserve, was a condition of lending and was fully disclosed to defendant and her attorney one month prior to the loan closing. Defendant has offered no further explanation or evidence in support of her averment.

Here, paragraph 2 (D) of the subject note states:

The interest rate I am required to pay at the first Change Date will not be greater than 9.875% or less than 5.875%. Thereafter, my interest will never be increased or decreased on any single Change Date by more than two percentage points (2.0%) from the rate of interest I have been paying for the preceding 12 months. My interest rate will never be greater than 13.875%.

Furthermore, the default interest rate rider states in pertinent part:

The last sentence of Paragraph 2 of the Note is hereby deleted and the following provisions are substituted in its place...

...In no event shall I be required to pay interest at an interest rate greater than the maximum interest rate permitted by law, or interest at the Default Interest Rate for a period greater than that permitted by law; in the event that you determine that interest at the Default Interest Rate is in excess of the above requirements, such excess will be credited to reduce the principal balance due on the loan...

As a result of the note calling for a variable interest rate of 7.875 percent per year and the limiting language contained in the note and rider, usury cannot be gleaned from the face of the instrument. However, defendant argues that the sum of \$275,000.00, an escrow holdback to insure defendant's payment on the loan for two years, should be a part of the interest rate calculation. Since the credible evidence before the Court clearly establishes that the escrowed sum of \$275,000.00 was available to and entirely depleted by defendant to pay her mortgage over a two year period, as such, these sums were already part of the interest rate and do not involve usury issues (*see Simbury Fund v New St. Louis Assoc.*, 204 AD2d 182, 611 NYS2d 557 [1st Dept 1994], *see also 1 Bergman, Mortgage Foreclosures* § 6.02 [3] [j]). Based upon the foregoing, defendant Pollock has failed to make a showing by competent evidence that the subject loan and mortgage securing it were void as usurious.

Defendant's second counterclaim and seventeenth affirmative defense that plaintiff had actual knowledge that she would be unable to make the monthly payments required by the promissory note by reason of the defendant's loan application and that plaintiff did so solely to collect up front finance charges are without merit. Here, plaintiff proffered evidence establishing that Emigrant did not solicit defendant Pollock nor does Emigrant advertise or solicit the general public; that Nationwide is an independent mortgage broker that was retained by defendant to act as her mortgage broker; that Nationwide, at defendant Pollock's request, elected to request a no-income documentation verification mortgage; that Emigrant has no direct contact with prospective borrowers; that it was the defendant that decided on the amount of the mortgage on her mortgage application; that since defendant elected to request a no-income documentation verification mortgage, no income was stated on the loan application and no documents regarding defendant's income were provided to Emigrant; and, that all disclosure documents were provide to defendant. More specifically, plaintiff submitted a copy of a high-equity loan certificate which informed Pollock that the subject loan was being issued based primarily upon the equity in her home, that her annual income would not be verified by the plaintiff, and that the plaintiff was relying upon Pollocks's representations as to her ability to repay the subject loan. Furthermore, defendant Pollock, who was represented by retained counsel, reviewed each loan document, did not have any objections to any of the documents presented and was provided with a three-day right to cancel the mortgage loan. At the closing conducted on June 12, 2008, defendant and defendant's counsel executed a special letter in which defendant attested that she had the ability to make her monthly payments on the mortgage.

In opposition, defendant Pollock set forth no evidence regarding her education, financial status, or access to legal or financial counsel, the availability of other types of loans or loans of a lesser amount, or any deception or high pressure tactics utilized by the plaintiff. Moreover, she did not offer evidence relating to the industry standards for residential loans at the time the subject loan was issued. Here, the

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plaintiff's evidence established that defendant Pollock was presented with clearly written documents describing the terms of the subject loan and alerting her to the fact the plaintiff would not independently verify her income. As such, defendant failed to proffer sufficient evidence to raise a triable issue of fact as to whether the plaintiff made any materially misleading statements or committed any misconduct with respect to the subject loan (*see Ladino v Bank of Am.*, 52 AD3d 571, 861 NYS2d 683 [2d Dept 2008]; *cf. Shovak v Long Is. Commercial Bank*, 50 AD3d 1118, 858 NYS2d 660 [2d Dept 2008]; *Lum v New Century Mtge. Corp.*, 19 AD3d 558, 800 NYS2d 408 [2d Dept 2005]).

With respect to the remaining affirmative defenses, answering defendant has failed to demonstrate, through the production of competent and admissible evidence, a viable defense which could raise a triable issue of fact (*see Deutsche Bank Natl. Trust Co. v Posner*, 89 AD3d 674, 933 NYS2d 52 [2d Dept 2011]). "Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion" (*Shaw v Time-Life Records*, 38 NY2d 201, 379 NYS2d 390 [1975]). Notably, defendant Pollock did not deny having received the loan proceeds and having defaulted on her loan payments in her affidavit.

Therefore, plaintiff's motion for summary judgment as against defendant Pollock and for order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (*see Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

Plaintiff is directed to forthwith submit a proposed order appointing a referee to compute pursuant to RPAPL 1321 in conformity with this decision, on notice to defendant.

Dated: September 16, 2014



 Hon. Joseph Farneti
 Acting Justice Supreme Court

____ FINAL DISPOSITION X NON-FINAL DISPOSITION