

Bank of Am., N.A. v Sarwar
2017 NY Slip Op 30849(U)
January 30, 2017
Supreme Court, Suffolk County
Docket Number: 31634/2012
Judge: C. Randall Hinrichs
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 49 SUFFOLK COUNTY

PRESENT: HON. C. RANDALL HINRICHS
Justice of the Supreme Court

Motion Date: 6/23/2015
Motion Sequence: 001 : MotD

Bank of America, N.A.,

Plaintiff,

-against-

Muhammad Sarwar, Zubaida Sarwar; "John Doe #1-5" and "Jane Doe #1-5" said names being fictitious, it being the intention of Plaintiff to designate any and all occupants, tenants, persons, or corporations, if any, having or claiming an interest in, or lien upon the premises being foreclosed herein,

Defendants.

_____ X

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Upon consideration of the notice of motion for summary judgment and related relief in favor of the plaintiff Bank of America, N.A. ["BANA" or "the plaintiff"], the supporting affidavits, affirmation, memorandum of law, and exhibits, the affirmation, affidavit, and exhibits in opposition to the plaintiff's motion on behalf of the defendants Muhammad Sarwar ["the defendant"], and Zubaida Sarwar, and the plaintiff's reply affirmation, affidavit, and exhibit in further support, it is now

ORDERED that the plaintiff's motion for an order granting summary judgment in its favor, dismissing each of the defendants' 23 affirmative defenses, and dismissing with prejudice each of the defendants' three counterclaims, amending the caption, and appointing a referee to ascertain and compute the amount due the plaintiff is granted in part and denied in part in accordance herewith; and it is further

ORDERED that so much of the plaintiff's motion for an order striking affirmative defenses and dismissing counterclaims is granted as to the Third, Fourth, Seven through Thirteenth, Fifteenth through Nineteenth Affirmative Defenses, and the Combined Twenty-First Affirmative Defense/First Counterclaim and Twenty-Second Affirmative Defense/Second Counterclaim, is granted, and as to the remaining Affirmative Defenses and the Twenty-Third Affirmative Defense/Third Counterclaim the motion is denied, with leave to renew, upon the completion of discovery; and it is further

ORDERED that so much of the plaintiff's motion for summary judgment in its favor and appointing a referee to compute the amount due the plaintiff is denied, without prejudice to renewal, upon the completion of discovery in accordance herewith; and it is further

ORDERED that so much of the plaintiff's motion that seeks to amend the caption is granted; and it is further

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

ORDERED that the attorneys for the parties shall appear for a pre-trial conference in **Part 49 in the Cromarty Court Building, Fourth Floor, Courtroom 16, Riverhead, New York at 9:30 AM on June 7, 2017**, at which time the plaintiff shall be prepared to either file a note of issue or renew its motion for summary judgment and the appointment of a referee; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared herein and not waived further notice pursuant to CPLR §2103(b)(1), (2) or (3) within thirty (30) days of the date herein, and to promptly file the affidavits of service with the Clerk of the Court.

In this residential foreclosure action there is no dispute that the defendants applied to BANA and received approval for a loan in the amount of \$632,335.90, secured by a mortgage encumbering the defendants' home located at 221 Beverly Rd., Huntington Station, New York ["the subject premises"]. The note was executed by defendant Muhammad Sarwar on March 26, 2010; the mortgage was executed by both defendants Muhammad and Zubaida Sarwar, both their signatures on the mortgage purportedly having been notarized by Suffolk County notary Nick Vitucci, on March 26, 2010.

There is also no dispute that the defendants defaulted on the loan for the payment due on February 1, 2012. Upon the defendants' failure to cure the default, BANA accelerated the balance due on the loan. Contractual and statutory notices were either served and/or mailed to the defendants at the subject premises, including notices pursuant to RPAPL §§1303 and 1304. BANA commenced a foreclosure action against the defendants on October 11, 2012. The defendants joined issue by the service of an answer asserting 23 affirmative defenses and three counterclaims. The answer included an affidavit in support by defendant Muhammad Sarwar dated November 5, 2012 ["the Sarwar affidavit"], chronicling the following narrative.

At all relevant times, Ali Naderi ["Naderi"], a non-party, was a long-standing employee of the Islamic Institute of New York, a religious mosque located in Queens County, New York, attended by the defendant and his family. Naderi introduced the defendant and his wife to a fraudulent business deal, allegedly conspiring with employees and agents of plaintiff BANA to lure the defendants to use the equity in the subject premises to finance a certain business transaction. In early 2010, Naderi arranged for the defendants to apply for a mortgage loan with BANA secured by the subject premises for the purpose of investing in a business deal to acquire nine Dunkin' Donuts located in the New York City area ["the business deal"]. Sometime in 2010, the defendant and his son, Aqil Sarwar, met with a broker named Amarbin Ahmed ["Ahmed"], and Ahmed's "boss", Shamveel Pasha ["Pasha"], at a Starbucks in Dix Hills. Naderi introduced the defendant and his son to Ahmed and Pasha as the plaintiff's representatives. At the meeting, Pasha informed the defendant and the defendant's son that he, Pasha, worked for the Merrill Lynch division of the Bank of America. Ahmed stated that he could obtain a

mortgage loan on the subject premises to finance the business deal. Naderi introduced the defendant and his son to other unidentified representatives of the plaintiff who, *upon information and belief*, conducted reasonable due diligence of the defendants' financial situation and the business deal that the mortgage loan was intended to finance. There is no dispute that neither Naderi nor Ahmed was ever employed by BANA or any of its subsidiaries.

After the initial meeting the defendant and his son met with Ahmed and Naderi at the Starbucks location several times to discuss the mortgage financing. During one of those meetings, Ahmed provided the defendant with a stack of loan applications for signature. Ahmed explained that these were standard forms that needed to be processed for the mortgage loan application and pointed at places where the defendant was to sign. When the defendant's son questioned Ahmed as to why many of the terms of the loan were blank, Ahmed explained that they would be filled in later and prodded the defendant to continue to sign the documents.

Shortly thereafter, the defendant and his son were told that the closing for the mortgage loan would occur at BANA's office at 999 Walt Whitman Road in Melville, Suffolk County, on March 26, 2010. The defendant was not represented by counsel at the closing. The defendant and his son were instructed not to go into the office building on the day of the closing until they met with the plaintiff's "loan officers" in the parking lot. The defendant and his son met with Naderi, Ahmed, and three other gentlemen who had allegedly "processed the loan application" on BANA's behalf. According to the Sarwar affidavit, *"upon information and belief"*, two of the representatives that he met in the parking lot on March 26, 2010, were identified as Ray Daloria and Peter Costa. The identity of the third purported "loan officer" was unknown. While still in their respective vehicles in the parking lot, "the plaintiff's representatives" instructed the defendant's son to write out several checks in the name of "Irina Pichkhadze". When the defendant balked, Ahmed left the defendant's car and sat in the other group's vehicle for some period of time. When Ahmed returned he informed the defendant and his son that the requested checks were for "officer's fees". The defendant then issued two checks to the order of Pichkhadze and two checks to the order of Nevula Corp. for a total amount of \$30,293.00.

Daloria then accompanied the defendant and his son inside the office building to a conference room believed by the defendant to be the offices of Suris & Associates, BANA's attorneys. A young man entered the room with a stack of papers and instructed the defendant to sign the papers, one sheet after the other, pointing out where to sign. The defendant assumed that the young man was the bank's attorney. Even though the defendant had reservations about these events, he felt reassured that the process was legitimate as the paperwork contained the logo of Bank of America. Notwithstanding that the mortgage, signed by both defendants, is dated and notarized as of March 26, 2010, according to the defendant, the defendant wife did not sign any papers until several days later when the same young man came to the defendant's house to obtain her signatures on the loan documents. At this subsequent visit the defendant learned that the young man who had supervised the signing in BANA's attorneys' Melville office was not in fact the bank's attorney, as Ahmed had represented and the defendant had assumed, but rather, a notary named Nick Vitucci. On March 31, 2010, the defendant received a wire deposit into his personal checking account in the sum of \$632,335.90 from Bank of America. The mortgage was recorded on April 26, 2010, by National Title Agency listed on the Suffolk County Recording and Endorsement Page as having an office at 999 Walt Whitman Road, Melville.

In April 2010, Naderi and Ahmed contacted the defendant and assured him that the business deal would go through as planned provided that the defendant deposited all the proceeds from the mortgage loan in a business account for the purpose of satisfying the franchise application requirements of Dunkin' Donuts. On April 16, 2010, the defendant deposited \$550,000.00 in a business account at Wilshire State Bank in Bayside, New York. According to the Sarwar affidavit, the business deal was never consummated and most of the funds that the defendant deposited were absconded and stolen by Naderi and his co-conspirators, "including employees, representatives and agents of the Plaintiff." Some time later, Naderi apparently returned \$150,000.00 of those funds to the borrower.

According to the supporting affirmation of Michael E. Eskenazi, an attorney from the law firm representing BANA, dated April 13, 2015, as of March 18, 2015, there was no criminal action pending in either Suffolk County or Queens County against any of the individuals named in the Sarwar affidavit. In January of 2013, after the defendants had served their answer, attorney Eskenazi contacted the Queens and Suffolk District Attorneys offices and was informed that there were no ongoing investigations into these activities by either office.

In support of its motion for summary judgment and other related relief, the plaintiff submitted proof of the note, the mortgage, and the defendants' default. As the originator of the loan, BANA also established its standing to commence the action and provided affidavits of service for the mailing of the contractual and statutory notices (*see* RPAPL §1303, §1304, §1320). The defendants have not challenged this proof. BANA also provided the affidavit of Judith L. Mutschler, an assistant vice president at BANA dated May 26, 2015 ["the Mutschler affidavit"]. According to the Mutschler affidavit, the affiant reviewed BANA's records as they relate to current and former employees and located no record of individuals named Amarbin Ahmed, Ray Daloria, or Irena Pichkhadze, concluding that these individuals had never been employed by either BANA or any BANA subsidiary.

However, according to the Mutschler affidavit, at the time of the subject loan's origination, Shamveel Pasha was employed by Merrill Lynch Wealth Management as a financial advisor. Nevertheless, BANA's records show no connection between Pasha and the subject loan, the defendant, or the defendants' family. BANA's records further show that in March, 2010, an individual named Peter Costa was employed by BANA as a Senior Client Manager in BANA's Middle Market division. According to the Mutschler affidavit, there is no record that Costa had any connection with the subject loan or its origination. Further, individuals with Costa's job title generally do not appear at residential loan closings, as alleged by the defendant. There were no affidavits proffered in support of the motion by either Pasha or Costa, and no explanation about who appeared on BANA's behalf at the closing on March 26, 2010.

Notably, in opposing the plaintiff's motion for summary judgment and other related relief, the defendant conceded that the plaintiff had made a prima facie showing in its foreclosure action by demonstrating that the plaintiff is the owner and/or holder of the loan documents, that there has been a default, and that the default has not been cured by the defendants, citing *Midfirst Bank v Agho*, 121 A.D.3d 343, 991 N.Y.S.2d 623. In opposition to the motion, the defendants assert that the mortgage loan that was suggested, orchestrated and executed by employees and agents of the plaintiff was for the purpose of funding a fraudulent business venture, money laundering, and/or financing terrorist activity abroad. Essentially, the defendants assert that evidence that Pasha, a Merrill Lynch employee, and Costa,

a BANA employee, colluded to misrepresent the defendants' income in order to orchestrate the approval of a mortgage from BANA to advance Pasha and Costa's own self interest, creates an issue of fact precluding summary judgment in BANA's favor.

The defendant Muhammad Sarwar submitted a second affidavit, in opposition to the plaintiff's motion, dated July 20, 2015 ["the opposing affidavit"]. The opposing affidavit added the following facts to those that were recited in the affidavit that was part of the defendants' answer. The current appraised value of the subject premises is approximately \$1,340,000.00. Naderi first approached the defendant about the business deal to acquire Dunkin' Donuts stores in 2008. On or about September 18, 2008, the defendant gave Naderi \$100,000.00 as an investment in the business deal. Shortly after making that investment, Naderi suggested that he could get a mortgage loan on the subject premises from the plaintiff to increase the defendant's investment in the business deal. Notwithstanding that the defendant received approval from the plaintiff for \$150,000 mortgage loan on or about October 15, 2008, the plaintiff's approval of this mortgage loan was rescinded due to insufficient income. The defendants' 2008 federal tax return reported the defendants' combined adjusted gross income to be \$10,250.00.

Further, at the first Starbucks meeting in January, 2010 among the defendant, his son, Ahmed, and Shamveel Pasha, Pasha told the defendant that he worked for the Merrill Lynch division of the plaintiff and gave the defendant a business card. Ahmed and Pasha represented to the defendant and his son that as BANA employees, they were in a position to facilitate a mortgage loan application on the plaintiff's behalf and they would proceed to assist the defendant in obtaining a mortgage loan on the premises. The defendant believed that plaintiff's representatives conducted reasonable due diligence of not only the defendant's financial situation but the business deal that the mortgage loan was going to finance. The next reference to Pasha was after the loan proceeds had been distributed to the defendant's checking account.

Sometime in September 2010, when the defendant inquired of Ahmed about the funds that the defendant had deposited related to the business deal, Ahmed provided the defendant with a Merrill Lynch CMA Account Statement in the name of "Ezaz Chowdhury- A & E Donut Inc., Pledged to ML Lender, Hollis NY11423-1608" with a Portfolio Balance in excess of \$1 million as of July 30, 2010. Ahmad represented that the funds provided by the defendant were co-mingled in this account and that the financial advisor of the account was Dhar and Pasha Group, referring to Shamveel Pasha first introduced to the defendant at the initial meeting at Starbucks in January, 2010.

With respect to the BANA employee identified as Peter Costa, the opposing affidavit added the following to the original Sarwar affidavit. A few days before the closing, on March 22, 2010, the defendant's son received an email from Naderi asking the defendant and his son to review an email allegedly forwarded by Costa in preparation for the closing. The subject email was sent by nodocpro@gmail.com and was addressed to nevula2004@aol.com. The subject line of the email was entitled "Final Conditions" and contained a bullet list of items that required action or an explanation by the defendant including homeowners insurance and the source of certain funds that had been deposited into a Chase account, and a direction that an old, abandoned in-ground pool be covered. That email was signed "Peter Costa" and was sent on Saturday, March 20, 2010. The addressee at nevula2004@aol.com responded to the sender, nodocpro@gmail.com on March 22, 2010, referring to the sender as "boss" and requesting him to call "nadire" and let him know what is needed "asap ... so we can do the closing...."

The next email is dated March 22, 2010, from nodocpro@gmail.com to Naderi at naderian786@gmail.com requesting Naderi to “get these letters of explanation and conditions today and also let us know that the pool is covered.” Naderi then forwarded the email chain to the defendant’s son on March 22, 2010 with the following message: “Please see this email and call me if you have any questions. Thank you.” In opposing the motion the defendant performed a Google search on July 10, 2015, and identified a “Peter Costa” who at some unspecified time may have been employed as a “Home Specialist at Bank of America”.

The defendant also asserts that between March 22 to March 26, 2010, he spoke to Costa on multiple occasions about the defendant’s personal income and banking information, Costa advising the defendant that the closing of the mortgage loan would occur on March 26, 2010, at the plaintiff’s attorneys’ law office located at 999 Walt Whitman Rd., Melville. Costa instructed the defendant and his son to wait in the parking lot and not go to the office until meeting with him (Costa) and additional “loan officers” of the plaintiff. When they met in the parking lot the defendant asserts that one of the plaintiff’s representatives, possibly Costa, instructed the defendant to write out several checks in the name of Irina Pichkadze and Nevula Corp.¹ The defendant became confused, apprehensive, and suspicious at the sudden demand for funds from completes strangers, so he instructed Ahmed and Naderi to cancel the loan. Ahmed went on to explain to the defendant that once the funds were dispersed, the defendant could invest the funds with him in a “hedge fund” and that the fund would disburse money to the defendant so that he could pay the monthly mortgage payments until the business deal with the Dunkin’ Donuts franchises was closed in 2 to 3 months. Ahmed was successful in persuading the defendant to write the checks, informing him that these were “officer’s fees” which were required as an accommodation so that they can collect their fees prior to the funding of the loan. The defendant reluctantly issued the checks as instructed and then proceeded to a conference room at the offices of Suris & Associates to close the loan. After the closing the defendant received a Uniform Residential Loan Application incorrectly overstating the defendant’s monthly gross income at \$11,856, more than 10 times higher than his actual monthly gross income as reported on his 2008 federal tax return.

Ultimately, the business deal was never consummated. The defendant never recovered the money that was deposited based upon Ahmed and Naderi’s assurances, and no convictions resulted from the investigations by the district attorneys of Queens and Suffolk Counties. The defendants assert that they are entitled to discovery since issues of fact are raised as to whether any BANA employees were complicit in fraudulently inducing the defendant to mortgage his residence for profit or otherwise. Notably, after the residential foreclosure settlement conference on November 4, 2013, the defendants never made a request for discovery until they opposed the plaintiff’s motion in July of 2015.

Nevertheless, in reply, the plaintiff asserts that the only connection between the plaintiff and the other purported co-conspirators in the scam is Peter Costa and Shamveel Pasha and the plaintiff has denied this, referring to an affidavit of one Michele C. Sexton. The plaintiff’s voluminous submissions do not include any such affidavit and its list of the “Papers Submitted” on the notice of motion refer to four affidavits and one affirmation, none of which are identified as having been submitted by Michele

¹ The first email allegedly sent by Costa on March 20, 2010, containing the pre-closing requirements was addressed to nevula2004@aol.com.

C. Sexton. Thus, the defendant has raised an issue of fact as to whether any employees or agents of BANA participated in a scheme with third parties to defraud the defendants of the equity in their home, precluding summary judgment in the plaintiff's favor and an order appointing a referee to ascertain and compute the amount due to the plaintiff.

With respect to the numerous affirmative defenses and counterclaims asserted in the answer, the defendants have not addressed the Seventh through Thirteenth Affirmative Defenses, the Fifteenth through Nineteenth Affirmative Defenses or the combined Twenty-First Affirmative Defense/First Counterclaim and Twenty-Second Affirmative Defense/Second Counterclaim. As to those affirmative defenses, where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists (*see Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 539, 369 N.Y.S.2d 667, 330 N.E.2d 624; *see also Madeline D'Anthony Enter., Inc. v. Sokolowsky*, 101 A.D.3d 606, 957 N.Y.S.2d 88; *Argent Mtge. Co., LLC v. Mentasana*, 79 A.D.3d 1079, 915 N.Y.S.2d 59). Thus, those affirmative defenses and the First and Second Counterclaims are stricken. The Third and Fourth Affirmative Defenses are also stricken as the plaintiff has established its standing to maintain the action (*Aurora Loan Servs., LLC v. Taylor*, 25 N.Y.3d 355, 361, 34 N.E.3d 363, 366).

The one and only settlement conference in this matter was conducted over three years ago. Yet, neither party has sought or provided discovery. The parties have a limited period of 120 days from the date of this order to complete discovery, at which time the attorneys for the parties shall appear for a pre-trial conference in Part 49 in the Cromarty Court Building, 4th Floor, Courtroom 16, Riverhead, **on June 7, 2017 at 9:30 a.m.**, and the plaintiff shall be prepared to either file a note of issue or renew its motion for summary judgment and the appointment of a referee.

The proposed order appointing a referee to compute has been marked "NOT SIGNED".

DATED: January 30, 2017


C. RANDALL HINRICHS
J.S.C.

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