

Cruz v Freedom Mtge. Corp.

2012 NY Slip Op 33341(U)

June 28, 2012

Sup Ct, NY County

Docket Number: 402396/10

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

IGNACIO CRUZ

Plaintiff(s),

- v -

INDEX NO. 402396/10
MOTION DATE 5-16-2012
MOTION SEQ. O. 001
MOTION CAL. NO. _____

FREEDOM MORTGAGE CORP., DARREN J. KAPLAN,
RUSHMORE CAPITAL PARTNERS, LLC, GREEN MOUNTAIN
FINANCE FUND, LLC, RAM, LLC, JONATHAN J. SOMERSTEIN,
KENNETH R. KALSTEIN, KIMBERLY CRUZ, WELLS FARGO
FOOTHILL, LLC, a/k/a WELLS FARGO CAPITAL FINANCE, LLC,
EMIGRANT MORTGAGE COMPANY, INC.,

Defendant(s).

FILED

JUL 05 2012

NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 3 were read on this motion and ~~cross motion~~ to for
Compel Discovery:

| | PAPERS NUMBERED |
|---|-----------------|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | <u>1</u> |
| Answering Affidavits — Exhibits _____ cross motion _____ | <u>2</u> |
| Replying Affidavits _____ | <u>3</u> |

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, It is Ordered that Plaintiff's request to compel discovery is granted, to the extent that Defendant, Rushmore Capital Partners, LLC ("Rushmore"), shall provide some of the documents and responses requested in Plaintiff's March 1, 2012 letter (the "Deficiency Letter"). Plaintiff's request for the imposition of conditional sanctions is denied.

Plaintiff brought this action claiming Defendants are liable for fraud whereby they divested Plaintiff of the title to his home and deprived Plaintiff of more than \$383,000 in home equity. Plaintiff seeks responses to, and the production of documents in compliance with, "Plaintiff's First Set of Interrogatories & Document Requests Directed to Defendant Rushmore Capital Partners", dated July 7, 2011 (Plaintiff's Interrogatories").

Rushmore opposes the motion claiming that its February 3, 2012 responses (the "Rushmore Response") to Plaintiff's Interrogatories, render the motion moot. Rushmore claims that the Rushmore Response properly responded to Plaintiff's Interrogatories, that the Rushmore Response was adequate for scheduling depositions where inadequacies in the Rushmore Response can be explored.

Pursuant to CPLR §3124, the Court may compel compliance upon failure of a party to provide discovery. It is within the Court's discretion to determine whether the

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

materials sought are "material and necessary" as legitimate subject of inquiry or are being used for purposes of harassment to ascertain the existence of evidence. See *Roman Catholic Church of the Good Shepard v. Tempco Systems*, 202 A.D. 2d 257, 608 N.Y.S. 2d 647 (N.Y.A.D. 1st Dept. 1994); *148 Magnolla, LLC v. Merrimack Mutual Fire Insurance Company*, 62 A.D. 3d 486, 878 N.Y.S. 2d 727 (N.Y.A.D. 1st Dept., 2009). "The words 'material and necessary' are...to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." *Allen v. Crowell-Collier Publ. Co.*, 21 N.Y. 2d 403, 288 N.Y.S. 2d 449, 235 N.E. 2d 430 (1968). The test concerning discovery is one of "usefulness and reason" and as such should lead to disclosure of admissible proof. Parties to an action are entitled to reasonable discovery of any relevant facts to the action. See *Spectrum Systems International Corporation v. Chemical Bank*, 78 N.Y. 2d 371, 581 N.E. 2d 1055, 575 N.Y.S. 2d 809 (1991); *Anonymous v. High School for Environmental Studies*, 32 A.D. 3d 353, 820 N.Y.S. 2d 573 (N.Y.A.D. 1st Dept., 2006).

Upon review of all the papers submitted with the motion, this Court finds that some of Plaintiff's requests in the Deficiency Letter are material and necessary for Plaintiff's discovery prior to depositions. Given the long and complicated dealings between the Plaintiff and the various Defendants, as well as the interconnected relationships among the various Defendants, trying to determine the completeness of the Rushmore Response by way of depositions of the agents of the various Defendants one by one seems to this Court to be a herculean task. For this reason, this Court finds the usefulness of some of Plaintiff's requests in the Deficiency Letter outweigh the burden imposed upon Rushmore by such a broad document production request and interrogatories.

Due to the voluminous nature of the Rushmore Response, neither party submitted a copy of the Rushmore Response along with their papers, which thankfully spares the Court the task of viewing the Rushmore Response in its entirety. In Schedule A of the Deficiency Letter, Plaintiff states specific interrogatories and documents it believes to be deficiencies in the Rushmore Response. Although this gives the Court an incomplete view of the Rushmore Response, the Court feels Schedule A is mostly sufficient to determine what interrogatories and document requests are most necessary to Plaintiff to sharpen the issues sufficiently to proceed to depositions.

In the paragraphs associated with "Response 1b" on Schedule A, Plaintiff requests emails, faxes, or other documents exchanged between Defendant, Darren Kaplan ("Kaplan") and Robert Gordon ("Gordon")/ Robert MacAllister ("MacAllister") during the loan application process. Plaintiff notes that emails between Gordon, MacAllister, Ira Tennenbaum ("Tennenbaum") and Kaplan for certain time periods were produced but that it is unclear if additional emails, faxes, or other responsive documents exist. Plaintiff also requests that Rushmore identify Tennenbaum and his role in Rushmore's activities. From the papers submitted, it is not clear to the Court that all of the above named individuals are agents of Rushmore. To the extent that any of the above named individuals are or during the relevant time period were agents of Rushmore, Rushmore shall produce the requested documents and/or answer the interrogatories.

In the paragraphs associated with "Response 3a" on Schedule A, Plaintiff asserts that Rushmore referenced written underwriting guidelines, a letter of explanation as to the borrower's needs, appraisal reports, BPOs, and online valuation tools, but failed to produce copies of such. To the extent the above named items exist and were referred to in the Rushmore Response, Rushmore shall furnish copies, or in the case of the online tools, provide Plaintiff with the means to access said tools.

In the paragraph associated with "Response 3b" on Schedule A, Plaintiff asserts that Rushmore referred to numerous communications between Kaplan and Rushmore, but did not produce copies. To the extent the above named communications exist and were referred to in the Rushmore Response, Rushmore shall produce copies of the referred to communications with clear indication that such are the referred to communications.

In the paragraphs associated with "Response 7a" on Schedule A, Plaintiff asserts that Rushmore did not state in reasonable detail its reason for overbreadth/vagueness objections. Without more detail the Court can not make a determination as to the materiality and necessity of this request. Plaintiff also requests clarity as to the identity of all individuals who prepared closing documents. Rushmore shall answer the Interrogatory as to whether Defendant Kenneth Kalstein prepared all closing documents on behalf of Rushmore and identify any other preparers. Plaintiff also requests copies of all versions and alterations of the quitclaim deed signed by Plaintiff. This request is over-broad and based on the papers submitted and arguments made by Plaintiff is neither material or necessary.

In the paragraph associated with "Response 11b" on Schedule A, Plaintiff asserts that the Rushmore Response made reference to a participation agreement between Rushmore and Defendant Green Mountain Finance Fund, LLC ("Green Mountain") but did not produce such. To the extent the above participation agreement exists and was referred to in the Rushmore Response, Rushmore shall produce a copy.

In the paragraph associated with "Response 11c" on Schedule A, Plaintiff asserts that Rushmore did not answer the question as to the services provided by Green Mountain and made reference to a due diligence package and appraisal, but did not produce a copy of such. Rushmore shall answer as to the services Green Mountain provided and if the referred to due diligence package and appraisal in any way relates to Rushmore's interaction with Plaintiff, then Rushmore shall produce said due diligence package and appraisal.

In the paragraph associated with "Response 12" on Schedule A, Plaintiff asserts that Rushmore did not address questions regarding the corporate structure and registration of Defendant, Ram, LLC. These questions are beyond the scope of discovery appropriate to Rushmore and better addressed directly to Ram, LLC.

In the paragraph associated with "Response 16" on Schedule A, Plaintiff asserts that Rushmore did not produce any emails, faxes, notes of communication, or other documents between Rushmore and Defendant Jonathan J. Somerstein ("Somerstein"). Rushmore shall produce, to the extent they exist, copies of all such documents related to Rushmore's interaction with Plaintiff. If such documents do not exist, Rushmore will give a statement explaining such.

Pursuant to CPLR §3126, sanctions are appropriate where there has been a showing of a willful violation of a prior Order for discovery and that the failure to provide discovery was willful, contumacious, or due to bad faith. This would include predicate failure to provide the discovery sought. See *Weissman v. 20 East 9th Street Corporation*, 48 A.D. 3d 242, 852 N.Y.S. 2d 67 (N.Y.A.D. 1st Dept., 2008); *Slegman v. Rosen*, 270 A.D. 2d 14, 704 N.Y.S. 2d 40 (N.Y.A.D. 1st Dept. 2000).

The Court is not aware of any prior discovery Orders in this case, and Rushmore has been responsive to what appears to be a large portion of Plaintiff's Interrogatories. Deficiencies in the Rushmore Response appear to be the result of a good faith belief on Rushmore's part that the Rushmore Response was adequate and that any deficiencies would be best resolved during depositions or in post-deposition discovery requests, therefore this Court is of the opinion that Plaintiff's request for sanctions pursuant to CPLR §3126 is premature.

Accordingly, it is ORDERED that Plaintiff's motion pursuant to CPLR §3124 to compel responses to Plaintiff's First Set of Interrogatories & Document Requests Directed to Defendant Rushmore Capital Partners, dated July 7, 2011 is granted to the extent that Defendant, Rushmore Capital Partners, LLC, shall provide supplemental responses to the responses dated February 3, 2012; and it is further,

ORDERED, that Rushmore is to specifically respond to Response 1b, Response 3a, Response 3b, the portion of Response 7a seeking the identity of all individuals responsible for preparing closing documents, Response 7b, Response 11b, Response 11c, and Response 16 from Schedule A of the March 1, 2012 letter from Plaintiff to Rushmore. Rushmore shall provide written responses to Interrogatories and copies of the documents requested, or to the extent any documents do not exist or can not be located, Rushmore shall provide an affidavit from an individual with knowledge stating the same and the substance of any documents that can not be located, within sixty days from service of a copy of this Order with Notice of Entry; and it is further,

ORDERED, that the remainder of Plaintiff's motion is denied, and it is further,


ORDERED that the Parties to this action are ordered to appear for a preliminary conference on September 5, 2012, in Room 307, 80 Centre Street, New York, New York at 9:30 a.m.

This constitutes the decision and order of this Court.

FILED

Dated: June 28, 2012

ENTER: JUL 05 2012

NEW YORK
COUNTY CLERK'S OFFICE

MANUEL J. MENDEZ
J.S.C. **MANUEL J. MENDEZ**
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE