

**Bank of N.Y. Mellon v Kahn**

2013 NY Slip Op 33159(U)

December 12, 2013

Sup Ct, New York County

Docket Number: 113825/09

Judge: Anil C. Singh

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

PRESENT: HON. ANIL C. SINGH  
SUPREME COURT JUSTICE  
Justice

PART 61

Index Number : 113825/2009  
THE BANK OF NEW YORK MELLON  
vs.  
KHAN, ROGER  
SEQUENCE NUMBER : 004  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 3, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). 1  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 2  
Replying Affidavits \_\_\_\_\_ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the annexed memorandum opinion.*

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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

Dated: 12/12/13

ACC, J.S.C.  
**HON. ANIL C. SINGH**  
**SUPREME COURT JUSTICE**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

S/O

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 61

----- X  
THE BANK OF NEW YORK MELLON F/K/A THE BANK  
OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATE  
HOLDERS CWALT, INC., ALTERNATIVE LOAN TRUST  
2007-HY6 MORTGAGE PASS-THROUGH  
CERTIFICATES, SERIES 2007-HY6,

Plaintiff,

Index No. 113825/09

- against-

ROGER KAHN, THERESE KAHN, NEW YORK CITY  
ENVIRONMENTAL CONTROL BOARD, THE BOARD  
OF MANAGERS OF THE PARK AVENUE COURT  
CONDOMINIUM, CITIBANK, N.A., MORTGAGE  
ELECTRONIC REGISTRATION SYSTEMS, INC.,  
ACTING SOLELY AS A NOMINEE FOR  
COUNTRYWIDE BANK, FSB, AND "JOHN DOE 1 to  
JOHN DOE 25", said names being fictitious, the persons or  
entities, if any, having or claiming an interest in or lien  
upon the mortgage premises described in the complaint,

Defendants.

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**HON. ANIL C. SINGH, J.:**

The plaintiff The Bank of New York Mellon f/k/a The Bank of New York, as Trustee for the Certificate Holders CWALT, Inc., Alternative Loan Trust 2007-HY6 Mortgage Pass-Through Certificates, Series 2007-HY6 (Bank of New York) moves, pursuant to CPLR 3212, for an order granting summary judgment against defendants Roger Kahn and Therese Kahn (the Kahns) striking their answer and dismissing their counterclaim, and pursuant to RPAPL 1321, appointing a referee to ascertain damages and to issue a report.

The Kahns cross-move, pursuant to CPLR 3212, for an order granting partial summary

judgment on their counterclaim for violation of the Truth-in-Lending Act, 15 USC § 1601 *et seq.* (TILA) and implementing Federal Reserve Board Regulation Z, 12 CFR § 226 *et seq.* (Regulation Z).

On May 7, 2007, the Kahns refinanced their existing mortgage on their principal dwelling, a condominium at 120 East 87<sup>th</sup> Street, in Manhattan, by entering into a mortgage with Countrywide Home Loans, Inc. (Countrywide). On September 22, 2009, the mortgage was assigned to Bank of New York. On October 1, 2009, Bank of New York instituted this action to foreclose on the note and mortgage. On November 30, 2009, less than three years after the closing, the Kahns served an answer that did not plead rescission. On March 31, 2011, more than three years after the closing, the Kahns served an amended answer pleading a rescission claim.

In their rescission counterclaim, the Kahns plead a violation of TILA in that Countrywide understated the finance charge in the required disclosure statement. The disclosure statement obligated the Kahns to pay an "Attorney/Settlement Agent" fee in the amount of \$750 at the closing. The Kahns actually paid a "Attorney/Settlement Agent" fee of \$795. It is alleged, therefore, that the disclosure statement impermissibly understates the finance charge by more than \$35 (TILA § 1635 [I] [2]). It is argued that a creditor must make "Material Disclosures" under TILA and the amount of the finance charge is a material disclosure (TILA § 1602 [u]; Regulation Z § 226.23 [a] [3]). It is further argued that TILA is strictly enforced against creditors, that liability will flow from even minute deviations from its requirements, and that the court has no discretion on a creditor's liability. The Kahns argue that their rescission claim relates back to their first answer served within three years of the closing (CPLR 203 [f]).

Bank of New York argues that the rescission claim was untimely raised in the Kahns' amended answer, served more than three years after the closing.

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence" to eliminate any material issue of fact from the case (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008] [internal quotation marks and citation omitted]). The "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. "[M]ere conclusions, expressions of hope or unsubstantiated allegations are insufficient" for this purpose (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]).

Bank of New York establishes that it was validly assigned the note and mortgage, and that the note and mortgage are in arrears (*Bank of N.Y. Mellon Trust Co, NA v Sachar*, 95 AD3d 695 [1<sup>st</sup> Dept 2012]). In addition, the mortgage provides for the appointment of a receiver in this foreclosure action (RPL § 254 [10]; *CSFB 2004-C3 Bronx Apts LLC v Sinckler Inc.*, 96 AD3d 680 [1<sup>st</sup> Dept 2012]).

Turning to the question of the timeliness of the Kahns' rescission counterclaim, CPLR 203 (f) provides:

“Claim in amended pleading. A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.”

Contrary to the Kahns’ assertion, the relation back doctrine (CPLR 203 [f]) has no application in determining whether or not rescission was timely demanded. 15 USC § 1635 (f) provides:

“Time limit for exercise of right. An 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, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part [15 USCS §§ 1631 et seq.] have not been delivered to the obligor, except that if (1) any agency empowered to enforce the provisions of this subchapter [15 USCS §§ 1601 et seq.] institutes a proceeding to enforce the provisions of this section within three years after the date of consummation of the transaction, (2) such agency finds a violation of this section and (3) the obligor's right to rescind is based in whole or in part on any matter involved in such proceeding, then the obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the earlier sale of the property, or upon the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later.”

In *Carthan-Ragland v Standard Bank and Trust Co.* (897 F Supp2d 706, 711 [ND Ill. [2012]) the court was faced with the same factual situation. The original pleading was timely served within three years of the closing, but did not plead a rescission claim under TILA. An amended pleading, served after the expiration of the three-year cut-off, did plead a rescission claim. The court held that the rescission action was untimely, and that under the Federal Rules of Civil Procedure, the amended pleading did not relate back to the timely pleading (*accord McOmie-Gray v Bank of Am. Home Loans*, 667 F.3d 1325; [9<sup>th</sup> Cir., 2012]; *Nulman v Money Warehouse, Inc.*, 2011 WL 830288 2011 US Dist. LEXIS 24448 [ED PA 2011]; *Martinez v*

*America's Wholesale Lender*, 2010 WL 431220 2010 U.S. Dist. LEXIS 14677 [CD Cal. 2010]).

The content of loan agreements are regulated by TILA 15 USCS §1601 et seq., and implementing Regulation Z, 12 CFR § 226. Creditors are required to disclose any "finance charges." 12 CFR § 226.18 (d). A creditor's failure to comply with TILA's requirements can subject the creditor to statutory and actual damages and may entitle the borrower to rescission (15 USC §§ 1635, 1640).

12 CFR 226.23 provides in relevant part:

"(a) Consumer's right to rescind. (1) In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction ...

"(2) To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business."

15 USC § 1635 [I] (Rescission rights in foreclosure) provides, in relevant part:

"(1) In general. Notwithstanding section 1649 of this title, and subject to the time period provided in subsection (f), in addition to any other right of rescission available under this section for a transaction, after the initiation of any judicial or nonjudicial foreclosure process on the primary dwelling of an obligor securing an extension of credit, the obligor shall have a right to rescind the transaction equivalent to other rescission rights provided by this section..."

The Supreme Court of the United States has held that the three-year rescission period is not a statute of limitations, but a component of the right itself and is a precondition to a substantive right to relief.

"Section 1635(f) ... takes us beyond any question whether it limits more than the time for bringing a suit, by governing the life of the underlying right as well. The subsection says nothing in terms of bringing an action but instead provides that the right of rescission [under the Act] shall expire" at the end of the time period. It

talks not of a suit's commencement but of a right's duration, which it addresses in terms so straightforward as to render any limitation on the time for seeking a remedy superfluous.”

(*Beach v Ocwen Fed. Bank*, 523 US 410, 417 [1998]).

Under the plain terms of TILA, the timing of a rescission notice turns on when the creditor receives the notice, and here, The Bank of New York did not receive the amended complaint until after the rescission period had expired.

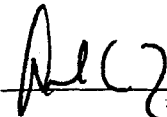
The TILA amendments were aimed in general to guard against widespread rescissions for minor violations (*McKenna v First Horizon Home Loan Corp.*, 475 F3d 418, 424 [1st Cir 2007]), thereby weakening the older case law favoring extension of the rescission deadline (*Melfi v WMC Mtge. Corp.*, 568 F3d 309 [1<sup>st</sup> Cir 2009] cert. denied 553 US 1112 [2012]).

Therefore, the Kahns may not assert, more than three years after the consummation of the transaction, the right to rescind as a counterclaim in this foreclosure action. 15 USC § 1635 (f) completely extinguishes the right of rescission at the end of the three-year period.

Accordingly, the motion for summary judgment against defendants Roger Kahn and Therese Kahn, striking their answer and dismissing their counterclaim, and pursuant to RPAPL 1321, appointing a referee to ascertain damages and to issue a report, is granted, and the cross-motion for summary judgment on the counterclaim is denied.

Settle Order on notice.

Dated: 12/12/13

  
HON. ANIL C. SINGH  
SUPREME COURT JUSTICE  
J.S.C.