

**Suntrust Mtge., Inc. v Kingston**

2013 NY Slip Op 33469(U)

December 23, 2013

Supreme Court, New York County

Docket Number: 110418/10

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER  
ALICE SCHLESINGER  
Justice

PART IA PART 16

Suntrust Mortgage

INDEX NO.

110418/10

MOTION DATE

- v -

MOTION SEQ. NO.

006

Viola Kingston

MOTION CAL. NO.

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is denied in accordance with the accompanying memorandum decision.

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

**FILED**

DEC 27 2013

COUNTY CLERK'S OFFICE  
NEW YORK

DEC 23 2013

Dated: \_\_\_\_\_

Alice Schlesinger  
J.S.C.

**ALICE SCHLESINGER**

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

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

-----X  
SUNTRUST MORTGAGE, INC.,

Plaintiff,

Index No. 110418/10  
Motion Seq. No.006

-against-

VIOLA KINGSTON, NEW YORK CITY TRANSIT  
ADJUDICATION BUREAU, SILO OPPORTUNITY  
FUND I, LLC, NEW YORK CITY ENVIRONMENTAL  
CONTROL BOARD, "JOHN DOE #1 through  
"JOHN DOE #12" the last twelve name being  
fictitious and unknown to plaintiff, the persons or  
parties intended being the tenants, occupants or  
corporations, if any, having or claiming an interest in  
or lien upon the premises, described in the complaint.

Defendants.

-----X  
VIOLA KINGSTON,

Third-Party Plaintiff,

-against-

Third-Party Index No. 591033/10

HARLEM REALTY SERVICES, JAMES PEBBLES,  
NEW YORK BEST DEVELOPMENT INC.,  
C/O AYAZ AWAN, HIGHRISE DEVELOPMENT  
CONSTRUCTION Lic. No: 600468 f/k/a NEW YORK  
BEST DEVELOPMENT INC., SABBA SALEEMI,  
NEW YORK CITY DEPARTMENT OF BUILDINGS,  
CHRIS WOLF, K.T. SEUNG Lic. No: 053953, OSCAR  
JACKSON Lic. No: 000594, CLERMONT CHAMBERS  
Lic. No: 011564, KNC ELECTRIC Lic. No: 003078,

Third-Party Defendants

-----X  
SCHLESINGER, J.:

**FILED**

DEC 27 2013

COUNTY CLERK'S OFFICE  
NEW YORK

Suntrust Mortgage Inc. ("Suntrust") the entity in possession of a mortgage and note signed by defendant Viola Kingston, is now moving for summary judgment in what it views as a straightforward foreclosure action. But it is not. While it is not contested that property located at 181 Lenox Avenue, a five story brownstone purchased by Ms. Kingston in 1988,

was made subject to a loan for \$1,700,000.00 from plaintiff's assignor in 2006 and that payments were made pursuant to that loan up until February 2010, defendant Kingston in her answer and in her lengthy opposition to this motion raises basic issues as to whether the loan, a construction loan at its inception, was tarnished with fraud and predatory lending practices and conflicts of interest.

Specifically, Ms. Kingston discusses at great length her contacts with a Suntrust representative/employee, Elaine Stroman. These contacts with Ms. Stroman and with James Peebles, who is a third-party defendant in this action, concern how and why the loan was made and how it was administered vis-a-vis the gut renovation of the property. It is a complicated rendition.

Initially, Ms. Kingston talks about the loan application process which concerned a loan initiated by Peebles, who plaintiff claims acted as an agent for the bank. Ms. Kingston then says that Ms. Stroman intentionally supplied that application with false information. The information overstated significantly the amount of income that Ms. Kingston had, not only in terms of her personal income such as pensions but also the money that she received from renting out space (this property was a single room occupancy building). Ms. Kingston said she truthfully gave the correct amount as \$11,957, but that Ms. Stroman inflated it to \$26,620. Arguably the reason that Ms. Stroman did this was to persuade the bank to approve the loan as meeting its guidelines. However, the plaintiff maintains that based on the actual income she had, the repayment terms were impossible to meet.

In the course of opposition papers, Ms. Kingston talks about her background, work history, lack of higher education, and how hard she and her husband worked to be able to purchase several properties in Harlem. She is now 71 years old and has spent many years

working as a hotel housekeeper. Her husband worked as a parking meter mechanic. In the 1980's they were able to purchase three dilapidated buildings in Harlem. One was on 120<sup>th</sup> Street and the other two on Lenox Avenue, the subject property at 181 and an adjacent building at 183 Lenox Avenue. Up until the time of her husband's terminal illness and death in 2006, he managed these properties. Ms. Kingston then took over the management, with no real experience or knowledge of these areas, and argues that at this time and under these circumstances she was vulnerable to exploitation. In her papers, she spells out how she believes this exploitation occurred with Ms. Stroman's substantial involvement.

Ms. Kingston's attorney also elaborates on what he believes were improper practices or worse pursued by Ms. Stroman and Mr. Peebles. Counsel also accuses the plaintiff of charging Ms. Kingston excessive unsubstantiated closing costs. Further, there are claims of conflicts of interest with Mr. Peebles and the Construction Co. named N.Y. Best, which was hired and supervised by Peebles with consent of Stroman.

In conclusion, counsel argues on behalf of his client that Suntrust took unfair advantage of Ms. Kingston "using high pressure tactics, unequal bargaining power, deceptive practices and confusing language in the loan documents" (§§18). He characterizes this case as "a prime example of procedural unconscionability" (§§19). He also claims that plaintiff, via Stroman and Peebles, made misrepresentations and deliberately omitted material information (§§ 21). Ultimately, the defendant argues that discovery is needed to pursue what she believes is a well-founded accusation of unfair and illegal loan practices. If such is found to be the case upon the completion of discovery, then the argument would be that this loan should not be enforced in a court of law.

Counsel for the plaintiff does not really address these accusations, at least as to their specifics involving Stroman and Peebles. His position is that there is nothing in the opposition "that can explain how any actions taken by the plaintiff in 2006 caused the defendant to be unable to make mortgage payments in February 2010" (§18). This being the case, moving counsel argues that the defendant's affirmative defenses must be stricken and his motion granted.

Moving counsel further argues that defendant should not be allowed to commit herself to repayment of a large financial obligation and avoid that repayment years later on the basis that she did not understand what she was signing, although, in fact, that is only a small part of what Ms. Kingston is claiming. Rather, it is her position that Ms. Stroman and Mr. Peebles affirmatively made misrepresentations geared toward having her entering into a loan agreement she could not comply with. In this regard, plaintiff's counsel argues that Ms. Kingston, by her actions in repayment and compliance with her obligations for several years, has ratified her loan. In my opinion, this is a strong argument as it seems clear that Ms. Kingston did comply with the repayment terms for three plus years and made something like 43 payments before she defaulted.

While neither Ms. Kingston nor her attorney deals specifically with the issue of defendant's repayment of the loan up to February 2010, what one does glean from a thorough reading of the opposition is that from the very beginning of the loan repayment, Ms. Kingston was behind by thousands of dollars each month (§26). Also, toward the end of 2007, when the construction work was still ongoing and Ms. Kingston was told she needed an additional \$425,000 to complete it, she, upon advice of Peebles, resorted to two "hard money lenders" in 2008. The first of these was a loan with Silo in March 2008 for \$900,000 secured by her properties at 120<sup>th</sup> Street and this building, 181 Lenox Avenue.

The second was with HVB in July of 2008 for \$725,000 with a blanket mortgage on 183 Lenox and the 120<sup>th</sup> Street property. What also is noted is that since this was a gut renovation of 181 Lenox, its former tenants left the building and were no longer paying rent. Thus, Ms. Kingston's income was substantially reduced even further.

By resorting to these two lenders, the defendant was forced to impair the integrity of her ownership of the two other buildings. What followed were two proceedings in State and Federal court in 2011, wherein Ms. Kingston lost both of these properties. The net result of all of these proceedings is a 71-year old widow left with a single property, the building in issue, where she resides.<sup>1</sup>

Defense counsel expresses concern that this Court may simply "rubber stamp" this foreclosure motion and allow it to go forward. I do not do that, particularly because at this stage, I am unable to make any findings of fact, which is, of course, not the Court's function. The Court's function is rather to find whether factual issues exist. Here, because the accusations made by the defendant have in no way been addressed via affidavits from anyone with personal knowledge of this loan, I must find that such factual issues exist. Specifically, I am addressing the absence of anything from Elaine Stroman, who has not been heard from as of yet and who I believe is still an employee of Suntrust. Therefore, she certainly must be deposed, and her actions in facilitating and administering this loan will be explored. For this Court to do otherwise and to ignore the serious accusations of improper and/or illegal conduct would in essence be countenancing such conduct, assuming it occurred.

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<sup>1</sup>However that building is now again rent producing. It was on that basis that this Court urged plaintiff to enter into some kind of fair modification of the loan, but Suntrust seemed unwilling to do that.

Finally, the plaintiff is not in a good position to argue prejudice from delay. This action was commenced in August 2010. Plaintiff has not done anything to move it along, either through loan modification or some other resolution until this motion was made in January 2013. Therefore, whatever delay ensuing discovery causes cannot be laid at defendant's door. It is the plaintiff who must take responsibility for years of delay.

Therefore, for the reasons stated above, and because this Court is not prepared at this time to dismiss the affirmative defenses which raise serious issues of fraud and improper banking practices, Suntrust's motion for summary judgment is in all respects denied. All counsel shall appear before this Court in Room 222 at 60 Centre Street on Wednesday, February 5, 2014 at 11:30 a.m. prepared to enter into a schedule to complete relevant discovery.

This constitutes the decision and order of this Court.

Dated: December 23, 2013

**DEC 23 2013**

  
\_\_\_\_\_  
J.S.C.  
**ALICE SCHLESINGER**

**FILED**

**DEC 27 2013**

COUNTY CLERK'S OFFICE  
NEW YORK