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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

x	Index
MANUEL MORALES	Number 5754 2008
	Motion
- against -	Date September 16, 2008
	Motion
AMS MORTGAGE SERVICES, INC.	Cal. Number 17
x	
	Motion Seq. No. 1

The following papers numbered 1 to 7 read on this motion by defendant Lehman Brothers Bank, FSB (Lehman) pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the complaint against Lehman.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1-5
Answering Affidavits - Exhibits.....	6-7

Upon the foregoing papers it is ordered that the motion is determined as follows:

This action arises out of two loans obtained by plaintiff from Lehman to refinance an indebtedness to nonparty Option One Mortgage Corp. and provide plaintiff with a cash out. Defendant AMS Mortgage Services, Inc. (AMS), a mortgage broker, through its employee, defendant Ivan Galeano, arranged the refinancing for plaintiff. The loans from Lehman, evidenced by notes, were secured by mortgages on plaintiff's property at 63-09 71st Street in Middle Village, Queens. The loan from Lehman secured by the first mortgage was in the amount of $552,000 and the mortgage given to secure it was an adjustable rate mortgage known as a five-year Option Arm with a six-month LIBOR Index. The second mortgage loan, in the amount of $103,500, had a fixed rate for a term of 30 years. The complaint, which contains nine causes of action against Lehman, is based upon plaintiff's claims of fraud, misrepresentation, deceptive practices and statutory violations by defendants in

connection with the mortgage transactions. In moving to dismiss the complaint, Lehman asserts that the factual allegations fail to state a cause of action against it, that certain of the causes of action are preempted by federal law, and that documentary evidence demonstrates a defense to plaintiff's claims.

Generally, on a motion to dismiss for failure to state a cause of action (CPLR 3211[a][7]), the focus is on whether a plaintiff has a cause of action and the factual allegations must be deemed to be true, with plaintiff being accorded the benefit of every favorable inference from the facts alleged. (See, Cron v Hargro Fabrics, 91 NY2d 362, 366 [1998]; Leon v Martinez, 84 NY2d 83, 87-88 [1994]; Guggenheimer v Ginzburg, 43 NY2d 268 [1977].) Where evidentiary material is submitted in support of a motion to dismiss for failure to state a cause of action, dismissal is warranted only where the evidence conclusively establishes that a material fact alleged by plaintiff is not a fact at all and that plaintiff has no cause of action. (See, Guggenheimer v Ginzburg, supra; Rovello v Orofino Realty Co., 40 NY2d 633 [1976]; Allstate Ins. Co. v Raguzin, 12 AD3d 468 [2004].) Similarly, to succeed on a motion to dismiss pursuant to CPLR 3211(a)(1) on the ground that a defense is founded upon documentary evidence, the documentary evidence upon which the motion is predicated must be such that it utterly refutes all factual allegations and definitively disposes of plaintiff's claim as a matter of law. (See, Goshen v Mutual Life Ins. Co. of New York, 98 NY2d 314, 326 [2002]; Montes Corp. v Charles Freihofer Baking Co., 17 AD3d 330 [2005]; see also, Allstate Ins. Co. v Raguzin, supra.)

Under the standards set forth above, the causes of action for fraud and violation of the Deceptive Practices Act (General Business Law § 349) are sufficient to withstand dismissal pursuant to CPLR 3211(a)(1) and (a)(7). Although the allegations of defendants' wrongdoing supporting these causes of action, including the inflation of plaintiff's income on the loan application in order to create the appearance he could afford the loan, advising plaintiff that the refinancing would lead to a more affordable mortgage, failing to disclose that the first mortgage loan was an Option ARM, and failing to inform plaintiff of the terms and consequences of the Option ARM such as negative amortization, are directed against codefendants AMS and Galeano, the complaint also alleges that AMS acted as Lehman's agent. The allegation that AMS was not merely the broker arranging the loans but Lehman's agent in processing the loans is buttressed by the assertion, substantiated by Lehman's own documentary evidence, that the loan applications on which Lehman purportedly relied in extending the loans were not executed by plaintiff until the closing date. Plaintiff has sufficiently alleged specific fraudulent representations or

concealment and, since information concerning the relationship between AMS and Lehman is within their exclusive knowledge, plaintiff should have the opportunity to conduct discovery proceedings on this issue. (See generally, Pludeman v Northern Leasing Sys., Inc., 10 NY3d 486, 491-492 [2008].) In addition, at least insofar as it is alleged that defendants misrepresented the nature of the documents plaintiff was signing and the nature and details of the loan transaction, plaintiff has alleged misleading or deceptive conduct in a typical consumer transaction that is within the ambit of General Business Law § 349. (See, Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A., 85 NY2d 20, 24-25 [1995].) Accordingly, the motion is denied with regard to the third and sixth causes of action.

In all other respects, the motion to dismiss is granted. It is noted that plaintiff's memorandum of law in opposition addresses only the issue of fraud. The first and second causes of action alleging violations of provisions of Banking Law § 6-*l* are devoid of merit as a matter of law. Defendant Lehman, a federal savings bank, is subject to the broad regulatory authority over federal savings associations granted to the Office of Thrift Supervision (OTS) by the Home Owners' Loan Act (HOLA) (12 USC § 1461 et seq.). (12 USC § 1464[a][1].) Pursuant to its grant of authority under HOLA, OTS has occupied the entire field of lending regulation for federal savings associations, preempting any state law purporting to address the subject of the operations of a federal savings association. (12 USC § 1463 [a][2]; 12 CFR § 560.2[a].) As a result, Banking Law § 6-*l*, which imposes requirements on certain home loans, is preempted by HOLA and the regulations promulgated thereunder from applying to federal savings associations. (See, Flagg v Yonkers Sav. and Loan Assn., 396 F3d 178 [2005]; State Farm Bank, F.S.B. v Burke, 445 F Supp 2d 207 [2006]; Boursiquot v Citibank F.S.B., 323 F Supp 2d 350 [2004]; see also, State Farm Bank, FSB v Reardon, 539 F3d 336 [2008].)

The fourth cause of action for violation of the Truth in Lending Act (TILA) (15 USC § 1601 et seq.) and Federal Reserve Board Regulation Z (12 CFR § 226) is insufficient in that it alleges that the subject security interest in plaintiff's property was obtained by Countrywide, not Lehman; does not allege that plaintiff exercised his right of rescission to trigger any duty on the part of Lehman with regard thereto under TILA; claims a failure to disclose that title was being transferred as part of the credit transaction although it is undisputed that the transaction was only a refinancing; and does not contain any factual basis for the conclusory allegations that required disclosures were not made "properly and accurately."

The conclusory allegations of the fifth cause of action fail to state a cause of action against Lehman for violation of the Real Estate Settlement Procedures Act (RESPA) (12 USC § 2601 et seq.). In addition, it is plaintiff's position that AMS performed services for Lehman, even acting as Lehman's agent in the loan transactions, and the payment of compensation for those services is not prohibited by RESPA. (12 USC § 2607[b], [c]; 24 CFR § 3500.14[c]; see, Potchin v Prudential Home Mtge. Co., 1999 US Dist LEXIS 22480, *9 [ED NY 1999]; Barbosa v Target Mtge. Corp., 968 F Supp 1548 [1997].)

The seventh cause of action seeks liquidated damages pursuant to Banking Law § 598(3) and (5) for Lehman's alleged breach of its duties under article 12-D of the Banking Law, which deals with licensed mortgage bankers. However, the liquidated damages provided for in section 598(3) is an additional remedy available to the court in an action "for breach of contract or agreement to make a mortgage loan." Plaintiff has not alleged such a cause of action. Similarly, section 598(5) is not applicable since the civil penalties it allows for are assessable against unlicensed or unregistered entities and there is no allegation that Lehman was unlicensed or unregistered.

The premise of the ninth cause of action, that plaintiff qualified for a fair interest prime loan, is defeated by the factual allegations of the complaint, as confirmed by plaintiff's affidavit, indicating that the total monthly carrying charge for a self-amortizing 30-year mortgage would have been nine cents more than plaintiff's monthly income.

The wholly conclusory allegations in the tenth cause of action that defendants targeted plaintiff for a sub-prime loan as a member of the Hispanic population in Queens who speaks little English and that defendants therefore violated an unspecified "Civil Rights Law" do not state a cognizable cause of action against Lehman. (Cf., Barkley v Olympia Mtge. Corp., 2007 US Dist LEXIS 61940 [ED NY 2007].) Moreover, the repeated claim by plaintiff in this cause of action that he qualified for a prime loan is deficient for the reason stated above.

Dated: December 11, 2008

AUGUSTUS C. AGATE, J.S.C.