[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CAROL E. HUFF Justice

PART 32

Index Number : 104146/2009
CHEVY CHASE, FSB
vs.
PARRILLO, VINCENT
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this [redacted]

motion is decided in accordance
with accompanying memorandum decision

FILED

FEB 05 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: FEB 01 2013

_____, J.S.C.
CAROL E. HUFF

1. CHECK ONE: ..... [X] 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

----------x

CHEVY CHASE BANK, FSB, : Index No. 104146/09

Plaintiff, :

- against - :

VINCENT PARRILLO a/k/a VINCENT PARILLO and JOHN DOE #1 through JOHN DOE #10, :

Defendants. :

----------x

CAROL E. HUFF, J.:

In this mortgage foreclosure action in connection with property located at 189 East 7th Street, New York, New York, plaintiff moves for summary judgment dismissing defendant's affirmative defenses, and for an order appointing a referee to compute.

Plaintiff has demonstrated prima facie entitlement to a judgment of foreclosure by submitting proof of the mortgage and default (Barcov Holding Corp. v Bexin Realty Corp., 16 AD3d 282 [1st Dept 2005]). Accordingly, the defendant "must assemble and lay bare affirmative proof to demonstrate the existence of a genuine triable issue of fact." Stainless, Inc. v Employers Fire Ins. Co., 69 AD2d 27, 32 (1st Dept 1979).

In defendant Vincent Parrillo's first affirmative defense, he contends that at the closing plaintiff failed to provide him with two copies of the Notice of Right to Cancel as required by the Federal Truth in Lending Act ("TILA"), 15 USC § 1601 et seq.

Plaintiff has presented copies of two Notices of Right to Cancel dated August 16, 2007, separately executed by Parrillo (the signatures have slight differences). Parrillo does not deny

that his signature is on both copies. The Notices state that Parrillo acknowledges receipt of two copies, and his initials appear on both copies beside handwritten dates indicating the last day to cancel the loan.

TILA provides that written acknowledgment of receipt of a Notice of Right to Cancel creates a rebuttable presumption of delivery. 15 USC § 1635(c). The defendant has the burden of rebutting or meeting the presumption, but it does not shift the burden of proof to him. Williams v First Govt. Mtge. and Inv. Corp., 225 F3d 728 (CA DC 2000).

Parrillo states that the closing for the $2.38 million loan took place in Hawaii where he was on vacation. The closing, which was arranged by plaintiff, was held late in the day, the person conducting the hearing was in a hurry, and "I signed many documents without having time to read them." Parrillo 6/5/12 Aff., ¶ 4. Later, "I glanced through my set of closing papers but did not read them." Id., ¶ 8. Parrillo states that, back at the hotel where he was staying, he put the closing documents in a sealed manilla envelope and did not touch them until he took them to his attorney's office in April 2009, after this action commenced. According to Parrillo, when the envelope was opened only one copy of the Notice of Right to Cancel was found. Parrillo then sent plaintiff a letter purporting the rescind the transaction.

The cases cited by Parrillo are distinguishable from this set of facts. In Macheda v Household Finance Realty Corp. of New York, 631 F Supp 2d 181 (ND NY 2008), both plaintiffs (co-borrowers) swore that they were left with one copy each of the Notice and returned only one in total. There is no indication that the lender had produced copies of two executed Notices for each plaintiff in connection with the litigation. In Macheda, the court stated that it declined to follow a line of cases that found a borrower's statement of non-receipt was

insufficient to rebut the TILA presumption. In the instant case, however, Parrillo does not swear that he was not given two copies of the Notice, but rather that two years later when the envelope was opened, "There was only one copy . . . among the documents." Parrillo Aff., ¶ 13.

In In re Underwood, 66 BR 656 (Bankr WD Va 1986), the plaintiffs swore they never received the notices, and closing documents were dated on two different days when there was no evidence the plaintiffs were present both days. In Cooper v First Govt. Mtge. and Inv. Corp., 238 F Supp 2d 50 (D DC 2002), the lender presented only one copy of the notice. In In re Jones, 298 BR 451 (Bankr D Kan 2003), the creditor had failed to give both co-borrowers two copies of the notice.

Because plaintiff has presented copies of two separately executed Notices of Right to Cancel, and Parrillo has not sworn that he failed to receive two copies, his contention that only one copy existed among the documents he saved from the closing does not suffice to rebut the presumption of delivery.

In Parrillo's second affirmative defense he contends that the action should be dismissed because plaintiff failed to serve the ninety-day notice required by RPAPL § 1304. However, plaintiff was not required to send the notice, since the $2.38 million loan was far beyond the "conforming loan size" for a one-unit dwelling at the time of origination. See RPAPL § 1304; Banking Law § 6-I(d)(I); Fannie Mae Historical Conventional Loan Limits, Ex. D to William A. Aumenta 5/24/12 Aff. In any event, plaintiff has presented evidence that it did send the notice (Alissia Brunson-Matthews 3/18/12 Aff.) and Parrillo has testified that he received a notice that fits the description of a ninety-day notice (Parrillo Deposition transcript dated 5/16/12, at 67:20 - 69:6).

In Parrillo's third affirmative defense he contends that the action should be dismissed because plaintiff failed to send the thirty-day notice required by the mortgage. Again, plaintiff has presented evidence of mailing of the notice (Brunson-Matthews Aff.) and Parrillo has failed to offer rebuttal evidence, not even stating in his affidavit that he did not receive the notice.

Accordingly, the affirmative defenses are dismissed, the motion for summary judgment is granted, and the motion seeking an order appointing a referee to compute is granted.

Settle order.

Dated: FEB 01 2013

CAROL E. HUFF
J.S.C.

FILED

FEB 05 2013

NEW YORK
COUNTY CLERK'S OFFICE