

**Lehman Bros. Holdings, Inc. v Resource Mtge.
Banking, Ltd.**

2013 NY Slip Op 32004(U)

August 21, 2013

Supreme Court, New York County

Docket Number: 652089/2010

Judge: Melvin L. Schweitzer

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

LEHMAN BROTHERS HOLDINGS, INC.

INDEX NO. 652089/2010

-v-
RESOURCE MORTGAGE BANKING, LTD

MOTION DATE

MOTION SEQ. NO. 002

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 motion is by plaintiff Lehman Brothers

for summary judgment is GRANTED;
The portion of the motion seeking
recovery of attorney's fees and costs is
severed and an award by referee
is directed;

Plaintiff is to serve a copy of this
order with Notice of Entry upon the
Clerk of the Trial Support Office
(Room 119), and service upon the Special
Referee Clerk (Room 11901), the Clerk
shall place this matter on the calendar
of the Special Referees Post for a
administration of the award of attorney's
fees and costs.

Melvin L. Schweitzer, J.S.C.

Dated: August 21, 2013

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

- 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

-----X		
LEHMAN BROTHERS HOLDINGS, INC.	:	
	:	
Plaintiff,	:	Index No. 652089/2010
	:	
-against-	:	DECISION AND ORDER
	:	
RESOURCE MORTGAGE BANKING, LTD. D/B/A COVINO & COMPANY AND D/B/A LUXMAC HOME MORTGAGE	:	Motion Sequence No. 002
	:	
Defendant.	:	
-----X		

MELVIN L. SCHWEITZER, J.:

Plaintiff Lehman Brothers Holding, Inc. (LBHI, and collectively with LBB, Lehman) moves for partial summary judgment pursuant to CPLR 3212 against Resource Mortgage Bank, Ltd. (Resource) with respect to plaintiff's claim on Loan Number ****2821 (Ippolite Loan). For reasons discussed below, Lehman's motion is granted.

Background

This case pertains to a contract under which Resource sold mortgage loans to Lehman Brothers Bank (LBB, and collectively with LBHI, Lehman). On November 22, 2004, Resource and LBB entered into a binding written Loan Purchase Agreement which incorporates the terms and conditions of the Aurora Seller's Guide (collectively, the Agreement). LBB subsequently sold its loans to LBHI and assigned all rights under the Agreement to LBHI.

Resource sold various loans to Lehman pursuant to the Agreement, including the Ippolite Loan. The loan was made in 2007 for \$200,000 at a 13.625% annual interest rate. These loans were purchased based on representations, warranties and covenants made by Resource about the quality of the loans. Resource agreed that if the borrower was more than 30 days late in making

either of the first two payments to LBB, it would repurchase the loan. This agreement to repurchase applied only in cases where the loan was delivered to LBB under Resource's Delegated Underwriting Authority (DUA), however. When the borrower on the Ippolite Loan failed to make her second payment on the loan, Lehman notified Resource. Resource did not repurchase the loan within 30 days of the written notice.

According to Lehman's calculation of total damages based on the "repurchase formula" defined in Section 800 of the Seller's Guide, Lehman requests partial summary judgment in the amount of \$311,773.50 plus attorneys' fees and costs with respect to the Ippolite Loan.

Discussion

To obtain summary judgment, the moving party must establish its cause of action "sufficiently to warrant a court's directing judgment in its favor as a matter of law." *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 (1988). In order to defeat the motion, the defending party must produce admissible evidence to establish a factual issue requiring trial. *Id.* The motion must be scrutinized in a light most favorable to the opposing party. *Negri v Stop and Shop, Inc.*, 65 NY2d 625, 626 (1985).

Under New York contract law, "a plaintiff is entitled to summary judgment as to liability on a breach of contract claim if it establishes (1) the existence of a valid contract, (2) its own performance under the contract, and (3) defendant's breach of its obligations under the contract." *Morgan Guar. Trust Co. v Bay View Franchise Mortgage Acceptance Co.*, No. 00-CIV-8613 (SAS), 2002 WL 818082, at *2 (SDNY April 30, 2002).

Lehman argues that it is entitled to summary judgment because all three elements of liability on a breach of contract claim are met. First, the Loan Purchase Agreement establishes the existence of a valid contract. Second, Lehman argues it performed its obligations under the

contract by paying for the Ippolite Loan, which was delivered pursuant to Resource's DUA, granted in a May 17, 2005 letter from Lehman to Resource. Finally, Lehman states that Resource breached its obligations by failing to repurchase the Ippolite loan within 30 days of notice.

Resource opposes the motion for summary judgment because it argues that it rescinded the DUA on which Lehman relies, in a letter Resource sent to Lehman dated May 25, 2005. Resource states that Lehman acknowledged both its receipt and the efficacy of this rescission. It argues that without DUA, Resource does not have a repurchase obligation. Even if the subsequent letter did not rescind Resource's DUA, Resource further argues that Lehman's May 17, 2005 letter stated that Resource's DUA was subject to representatives of Resource attending Lehman's DUA training session. No Resource representative ever attended any training session at any time. Since the granting of DUA was conditioned on attendance at the training session, Resource argues that it never had DUA and thus had no repurchase obligation.

Lehman counters that regardless of Resource's alleged rescission letter of May 25, 2005, Resource is subject to DUA because it accepted it again in December 2006. This second DUA predated the defendants' sale of the Ippolite Loan in May 2007. The Ippolite Loan was therefore eligible for DUA under the December 2006 agreement.

Resource responds with an argument that Monica Capela, the person who signed this December 2006 DUA Agreement, was never an officer of Resource and never had authority to sign any agreement on behalf of Resource. Michael Covino, President of Resource, argues that all previous agreements between Lehman and Resource were executed only by him. The court is not persuaded by Mr. Covino's argument. Ms. Capela had apparent authority, and Lehman

relied upon her signature. The court thus finds that Resource is bound by the December 2006 DUA Agreement signed by Ms. Capela.

Conclusion

Since the Ippolite Loan was subject to DUA under the December 2006 agreement between Lehman and Resource, Resource had a repurchase obligation that it failed to uphold. Because there is no material issue of fact, Lehman's motion for summary judgment is granted. Lehman is entitled to \$209,876.85 in damages and interest at a rate of 9% per annum from the date of breach plus attorneys' fees and costs with respect to Lehman's claim on the Ippolite Loan.

Accordingly, it is

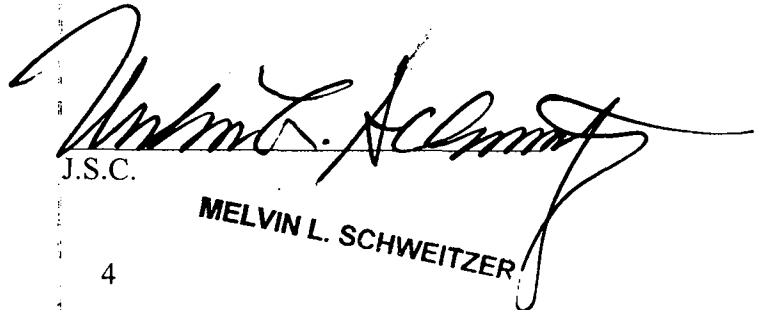
ORDERED that plaintiff's motion for summary judgment is granted; and it is further

ORDERED that the portion of this motion seeking recovery of attorneys' fees and costs is severed and an assessment thereof is directed; and it is further

ORDERED that plaintiff is to serve a copy of this order with Notice of Entry upon the Clerk of the Trial Support Office (Room 119) ~~and upon the payment of fees for the order~~ and service upon the Special Referee Clerk (Room 119M), the Special Referee Clerk shall place this matter on the calendar of the Special Referee's Part for a determination of the amount of attorneys' fees and costs.

Dated: August 21, 2013

ENTER:


J.S.C.
MELVIN L. SCHWEITZER