Mackenzie v Emigrant Mtge. Co., Inc.
2017 NY Slip Op 31326(U)
May 30, 2017
Supreme Court, Bronx County
Docket Number: 310625/10
Judge: Julia I. Rodriguez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

--X **Index No. 310625/10**

Lionel F. Mackenzie,

,

Plaintiff,

-against-

DECISION and ORDER

Emigrant Mortgage Company, Inc.

Defendant.

Present:
Hon. Julia I. Rodriguez
Supreme Court Justice

--X

Recitation, as required by CPLR 2219(a), of the papers considered in review of defendant's motion, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the complaint.

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits	**1**
Memorandum of Law	**2**
Affirmation in Opposition & Exhibits	**3**
Reply Affirmation	**4**

On or about July 29, 2010, plaintiff purchased a coop apartment located at 684 West 204th Street, Bronx, New York. At the time of purchase, plaintiff mortgaged said property which was secured by a loan from Sovereign Bank , in the amount of $268,000 at a fixed interest rate of 5% annually. While searching the internet in an attempt to obtain more favorable financing, plaintiff saw an online advertisement for mortgage financing by Emigrant and went to an open house seminar at one of its branches. At the open house, plaintiff spoke with an Emigrant mortgage broker and, subsequently, submitted an application for a loan with Emigrant.

In the instant action, plaintiff seeks declaratory relief obligating Emigrant Mortgage Company, Inc. ("Emigrant") to proceed with the terms of a loan commitment dated October 19, 2010 ("Loan Commitment") for a loan in the amount of $268,000 (the "Loan"), monetary damages for alleged breach of contract and fraud and deceit and punitive damages in the amount of $500,000. In the complaint, plaintiff alleges that Emigrant failed to close on the Loan on the terms set forth in the Loan Commitment and deceived him to obtain money from him.

Emigrant now moves for dismissal of the complaint, pursuant to CPLR 3211(a)(1) and (a)(7), and for summary judgment, pursuant to CPLR 3212, on the grounds that plaintiff failed to comply with the terms and conditions of the Loan Commitment and the lock-in interest rate contained therein expired through no fault of Emigrant.

In support of the motion, Emigrant submitted, *inter alia,* the affidavit of John Anderson with attached exhibits. In his affidavit, Anderson states as follows: On or about August 20, 2010, an Emigrant employee provided plaintiff with a Good Faith Estimate at 4.375%. On September 8, 2010, plaintiff executed the Good Faith Estimate as well as an Interest Rate Election Agreement (the "Rate Lock Agreement") which provided that the rate of 4.375% (the "Initial Lock-in Rate") would be locked in for 60 days, expiring on November 7, 2010. He attached copies of the Good Faith Estimate and Rate Lock Agreement to his affidavit. Anderson further states: On September 20, 2010, Emigrant conducted an inspection and appraisal of the subject property. The inspection revealed that plaintiff was not residing at the property, as there was construction being done on the premises. On October19, 2010, Emigrant offered a loan commitment to MacKenzie which would expire as of December 20, 2010 (the "Loan Commitment"). Included in the Loan Commitment was a reference to the Initial Lock-in Rate of 4.375% and the expiration date of November 7, 2010. He attached a copy of the Loan Commitment to his affidavit. Paragraph 10 of the Loan Commitment specifically provides that if the loan does not close by the expiration date, Emigrant will not be required to adhere to the 4.375% Initial Lock-in Rate. The Loan Commitment included certain conditions to closing including, but not limited to, a re-inspection fee and final inspection of the property, proof of occupancy by plaintiff and a list of documents which plaintiff was required to submit to Emigrant in order to close on the Loan. On October 28, 2010, plaintiff executed and returned the Loan Commitment. According to Anderson, prior to the Loan Commitment being issued, the parties were aware that plaintiff did not reside at the property and that a re-inspection of the property would be required once plaintiff occupied the property. Plaintiff advised Emigrant that he would move in to the property no later than November 1, 2010. On or about November 1, 2010, plaintiff sent a letter to Emigrant which included a check for payment of the re-inspection

fee, as well as the name of a contract person at the Coop's management company (the "Coop"). Pursuant to the Loan Commitment, it was plaintiff's sole responsibility as borrower to produce all of the documents required by Emigrant, which included documents required from the Coop. On November 5, 2010, Emigrant re-inspected the property. At the time of the November 7, 2010 expiration of the Lock-in Rate, Emigrant had not received all the required documents. On November 17, 2010, the Coop sent an email to Emigrant providing Emigrant with the current insurance certificate and advising Emigrant, for the first time, that the Coop was currently refinancing. Based upon the fact that the Coop was refinancing, Emigrant required additional information from the Coop related to the refinancing. On November 18, 2010, Emigrant sent an email to the Coop requesting information regarding the refinancing. He attached copies of the two emails to his affidavit. Anderson further states: Emigrant sent follow-up emails to the Coop and plaintiff requesting that the Coop's refinancing information be provided to Emigrant. However, the Coop did not yet have the information for the pending refinance. The Coop's pending refinancing was considered a change in circumstance and, as a result, a Change of Circumstances waiver was required which included a $200 fee. As the Loan Commitment was set to expire on December 20, 2010, Emigrant issued an extension of the commitment, dated December 16, 2010, along with a corresponding Good Faith Estimate, which extended the commitment to January 8, 2011 (the "Commitment Extension"). He attached a copy of the Commitment Extension to his affidavit. The Commitment Extension was executed by plaintiff on December 22, 2010. The Commitment Extension states that while the loan commitment is extended to January 8, 2011, the Initial Lock-in Rate of 4.375% expired on November 7, 2010 thereby subjecting it to change. By December 23, 2010, Emigrant received all of the documentation required under the Loan Commitment. Emigrant then issued an updated Loan Commitment and corresponding Good Faith Estimate, both dated December 27, 2010, which included the then current interest rate of 4.75%, and provided a new lock-in period for this rate to expire on January 7, 2010. He attached copies of the updated Loan Commitment and Good Faith Estimate to his affidavit. According to Anderson, Emigrant made attempts to schedule a

closing date but plaintiff refused to close. On or about December 29, 2010, plaintiff instituted the instant action.

In opposition to the motion, plaintiff submitted, *inter alia,* his affidavit with attached documents. In his affidavit, plaintiff states: On or about September 8, 2010, Emigrant issued a Good Faith estimate to him with an initial interest rate of 4.375%. On that date, he gave Emigrant a check in the amount of $525.00 to initiate the loan process. On or about September 20, 2010, an "appraisal" of his property was conducted. In a letter dated October 19, 2010, Emigrant informed him that his loan had been approved. A revised Good Faith Estimate was provided with that letter which included an additional $150.00 fee for re-inspection of the property. In a separate letter dated October 19, 2010, Emigrant stated that they were unable to issue the loan as requested because a final inspection was required. He contacted Emigrant and was told that "a final inspection was required prior to issuing the mortgage loan." On October 28, 2010, he provided Emigrant with a check in the amount of $150.00 for the re-inspection. On or about December 7, 2010, he received a Revised Loan Commitment and Good Faith Estimate, which included a $200.00 fee for "approval of coop waiver from FNMA (coop does not meet guidelines)." On December 16, 2010, he signed a second Revised Commitment Loan and Good Faith Estimate which included a $175.00 "re-issue fee [to be] collected at closing." On December 20, 2010, he was informed by Emigrant that, on that date, they could offer him a 4.75% interest rate because he had "gone past the lock-in date of original loan application. This rate is subject to changes daily." On December 22, 2010, he filed a written complaint with the New York State Banking Department. On December 29, 2010, he commenced the instant action.

* * * * * * * * * *

On a motion to dismiss pursuant to CPLR §3211(a)(1) and (a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Leon v. Martinez,* 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary

evidence are not entitled to any such consideration." *See Maas v. Cornell,* 94 N.Y.2d 87, 91, 699 N.Y.S.2d 716 (1999). Dismissal is warranted only if the documentary evidence submitted utterly refutes plaintiff's factual allegations and conclusively establishes a defense to the asserted claims as a matter of law. *See Goshen v. Mutual Life Ins. Co. of N.Y.,* 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858 (2002); *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.,* 10 A.D.3d 267, 270 (1st Dept. 2004). Affidavits submitted by a defendant to attack the sufficiency of a pleading "will seldom if ever warrant the relief he seeks unless . . . the affidavits establish conclusively that plaintiff has no cause of action." *See Rovello v. Orofino Realty Co., Inc.,* 40 N.Y.2d 633, 636, 389 N.Y.S.2d 314 (1976).

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center,* 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court; the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted, and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *See Aasaf v. Ropog Cab Corp.,* 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept. 1989). Summary judgment will be granted only if there are no material, triable issues of fact. *Sillman v. Twentieth Century-Fox Film Corp.,* 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957).

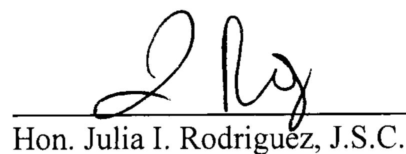
Here, plaintiff disputes some of the fees that he was charged (and paid) and the increased interest rate on the loan after the lock-in date of November 7, 2010 had passed without closing on the loan. Notably, plaintiff does not dispute that it was not until December 23, 2010 that Emigrant received all of the required documents from plaintiff and that it was his obligation to provide those documents. Although the Loan Commitment was modified several times, all of the versions include the following language: "If the loan closes on or before 11/07/2010, the Interest Rate shall be 4.375% per annum." Also, the Interest Rate Election Agreement executed by plaintiff indicates a lock-in date of September 8, 2010, a lock period of 60 days and a lock expiration date of November 7, 2010. As the loan did not close on or before 11/07/2010 because

[* 6]

Emigrant did not have all of the necessary documentation from plaintiff, Emigrant was not obligated to offer plaintiff an interest rate of 4.375% after November 7, 2010. Further, the fees charged are expressly set forth in the various loan documents and are not unreasonable given the circumstances.

Based upon the foregoing, Emigrant's motion is **granted** and the complaint is hereby dismissed with prejudice.

Dated: Bronx, New York
May 30, 2017



Hon. Julia I. Rodriguez, J.S.C.